83-1364

No. 83-
(A-561)

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

GERARD COLBY ZILG,
PETITIONER,

v.

PRENTICE-HALL, INC.,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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QUESTIONS PRESENTED

(1) Whether a United States Court of Appeals may, consistently with the First Amendment, deprive an author of a breach of contract judgment against a publisher solely because of the appeals court's distaste for the style and political content of the author's work.

(2) Whether Federal Rule of Civil Procedure 52(a) requires reversal of a United States Court of Appeals decision overturning a trial judge's fact findings that a publisher did not perform its contract in good faith, where the appeals court did not determine that such findings were clearly erroneous.

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Petition for a Writ of Certiorari
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Petitioner, Gerard Colby Zilg, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on September 1, 1983, insofar as it reversed a judgment in his favor against respondent Prentice-Hall, Inc.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in Zilg v. Prentice-Hall, Inc. is reported at 717 F.2d 671, 9 Med.L.Rptr. 2257 (BNA) (1983). The opinion of the United States District Court for the Southern District of New York denying defendant Prentice-Hall's motion for summary judgment is reported at 515 F.Supp. 716, 7 Med.L.Rptr. 1634 (1981) (Brieant, J.) The district court's Findings, Conclusion and Order (78 Civ. 0130-CLB April 20, 1982) is unreported. All three opinions are reproduced in the appendix to this petition at 1a-22a, 113a-118a, and 24a-112a, respectively.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Second Circuit was rendered on September 1, 1983 and a petition for rehearing by that court was denied without opinion on October 17, 1983. Appendix B at 23a. On January 13, 1984, petitioner filed an Application for Extension of Time Within Which to File a Petition for Writ of Certiorari. On January 17, 1984, Justice Marshall extended the time for filing this petition to and including February 14, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The constitutional provisions

involved in this petition are the First Amendment and the Fifth Amendment, insofar as its due process clause incorporates the principle of equal treatment under law. The First Amendment reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment reads in pertinent part:

> No person shall...be deprived of life, liberty, or property, without due process of law...

The rule involved is Rule 52(a) of the Federal Rules of Civil Procedure:

> RULE 52. Findings by the Court
>
> (a) Effect. In all actions tried upon the facts without a jury

or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decision of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

On January 11, 1978, petitioner Gerard Colby Zilg brought a diversity action in the United States District

Court for the Southern District of New York against Prentice-Hall, Inc., the publisher of his book, Du Pont: Behind the Nylon Curtain, for breach of contract; and against E.I. Du Pont de Nemours & Co., Inc. ("Du Pont"), in large part the subject of the book, for tortious interference with contract. As to Prentice-Hall the plaintiff alleged that during the latter part of 1974 and early 1975 the publisher reneged on its contractual obligations and failed to make reasonable good-faith efforts to promote and sell the book--in the jargon of the trade, the book was not published but "privished."

Petitioner began research for the book before 1970 and in June 1972 entered into a contract with Prentice-Hall for its publication. Findings, Conclusions and Order

("Findings") at 3,5, 26a, 28a. The book was to be a detailed historical account of the rise of the Du Pont family and corporation, the family's internecine struggles, its involvements with wars, presidents, foreign policy, and the American economy, and its immense wealth. The author's approach was, overall, highly critical of the role that the Du Pont family has played in American history, and Prentice-Hall was aware as early as February 1974 of the possibility of a libel suit. Findings at 5-7, 27a-30a. In-house legal counsel determined that the book's judgments were constitutionally protected. Id. at 7, 29a.

The manuscript was delivered in late 1973 and accepted for publication. Prentice-Hall decided in March 1974 to publish an initial press run of 15,000,

based in part on an advance-sale estimate of 7,500. Relying on these estimates, the company adopted a $15,000 advertising budget.[1] Findings at 10-11, 63, 32a-34a, 87a-88a.

In mid-1974 the Book of the Month Club entered into an agreement with Prentice-Hall to reprint the book for sale through its Fortune Book Club division. Findings at 33, 57a. However, members of the Du Pont family had obtained the manuscript and in July 1974 a Du Pont executive called the Book of the Month Club to say that in the view of some Du Ponts and their lawyers,

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[1] It is common in the industry for the advertising budget to be keyed to advance sales. In this case, as the district court found, the advance sales turned out to be consistent with the projection-- "right on target"--id. at 63, 88a. The court found that the budget was not "tentative." Id. at 10, 33a.

the book was "scurrilous" and "actionable. "Id. at 34, 58a. As a consequence, admittedly intended by Du Pont, the book club cancelled its contract. Id. at 48, 74a. After some further telephone exchanges, including conversations between executives of Prentice-Hall and Du Pont, the publisher reduced the book's press run by one-third and its advertising budget by two-thirds. As a consequence the book was out of print for several weeks in January 1975, at a time when it was receiving favorable reviews and had become a best seller in Delaware. These events formed the primary basis of the petitioner's breach of contract claim.

The district court, after a two-week trial in September 1981, rendered judgment for the plaintiff against Prentice-Hall and dismissed as to

Du Pont.[2] In its 85-page Findings, issued on April 20, 1982, the court found that Prentice-Hall violated its contractual duty to Zilg in that it did not make reasonable good-faith efforts to promote and sell his book. Specifically, Prentice Hall:

(1) cut the first printing from 15,000 to 10,000 without any sound business reason;

(2) reduced the advertising budget from $15,000 to $5,500 without any sound business reason; and

(3) allowed the book to go out of print just as it was gaining sales momentum.

Findings at 57-60, 82a-84a. In support of these factual conclusions, Judge Brieant found the following:

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[2] The judgment in favor of Du Pont was affirmed on appeal, and is not challenged in this petition.

(1) The reason offered by Prentice-Hall for reducing the press run--that the Book of the Month Club had cancelled its contract to use the book--was wholly pretextual. The district court found that it is elementary knowledge in the publishing industry that Book of the Month Club does its own printing, from plates supplied by the publisher. The Book of the Month Club contract in fact specified this procedure. Findings at 61-62, 86a-87a. Thus, Prentice-Hall's assertion at trial that the print order was cut because 5,000 copies were planned for the book club's use "is simply not true; it is a fabrication." Id. at 62, 87a.

(2) Prentice-Hall's book production committee estimated first year sales of 12-15,000, including advance sales of

7,500. Based on these estimates, Prentice-Hall projected a $15,000 advertising budget. The actual advance sales were "substantially in line" with the estimate.

> This would suggest to an experienced publisher such as Prentice-Hall that its predictions were right on target, and therefore that its tentative plans for the exploitation of the Book should be adhered to. Nevertheless, at some time between September 9, 1974 and December 19, 1974, Prentice-Hall cut the advertising budget from $15,000 to $5,500...
>
> This significant reduction in advertising took the heart out of the advance sale momentum which the book had generated.

Findings at 63-64, 88a.

(3) Prentice-Hall "intentionally permitted the Book to go out of print at a time when [it] was just beginning to receive considerable publicity and favorable reviews, e.g., the December 15, 1974 New York Times Book Review, Ex.273, and while the BOMC-Du Pont

situation was first receiving public notice. Permitting the Book to go out of print at a time when its sales momentum was just beginning to build had a severe detrimental effect on sales." Id. at 81, 108a.

(4) The trial court found it unnecessary "to attribute a motive" to Prentice-Hall's activities. Id. at 64, 88a. It accepted Prentice-Hall's denial that pressure from Du Pont had influenced its decision to "privish." But it also rejected the possibility that dissatisfaction on the part of one company executive with the overall style and content of Du Pont: Behind the Nylon Curtain, at a stage in the publishing process long after the book had been accepted and edited, could relieve Prentice-Hall of its obligation to publish and promote the work in good

faith. Id. at 65, 89a.[3] This was particularly true in light of substantial advance sales, best seller status in Delaware, and several favorable reviews, including one in the influential New York Times. Findings at 11 and n.4, 15-16, 26, 68, 81, 34a and n.4, 38a, 51a-52a, 93a, 108a. If Prentice-Hall had been dissatisfied with the style or content of the book, it could have rejected it or demanded additional editing changes. Having accepted the work, however,

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[3] Prentice-Hall did not take the position that dissatisfaction with the book's style or content triggered its decisions to cut the budget and press run. On the contrary, it claimed that the press run reduction was motivated by a mistaken belief that Book of the Month Club was to buy 5,000 copies and that the $15,000 advertising budget had only been tentative--assertions that the trial court, as noted, found not credible.

"Prentice-Hall had the duty to perform under the Agreement." Id. at 65, 89a. It did not do so, the judge concluded; instead, he agreed with the expert witness, William Decker, that Prentice-Hall intentionally withheld efforts to sell the book, id. at 66-67, 91a-92a; and, quoting Decker, found that "the Book was 'privished' rather than properly published." Id. at 65, 89a.

On appeal, the Second Circuit overturned Zilg's judgment against Prentice-Hall. The legal basis for the reversal was murky. The appeals court took issue with the trial court's occasional references to a requirement that Prentice-Hall use its "best efforts" to promote the book. 717 F.2d at 681, 20a.[4] But it did not

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[4] Examination of the Findings discloses that despite these (fn cont'd)

reverse on this basis, for, applying the legal test of good faith as the trial court in fact also had, it explicitly overruled Judge Brieant's extensive fact findings on this issue. Yet it did not say that those findings were clearly erroneous.

The only clarity in the opinion was the panel's explicit distaste for the political content and style of Zilg's work, and its consequent conviction that the author could not have been harmed, as the trial court found he was, by the

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(fn cont'd) references to "best efforts," the trial judge clearly did apply the good faith rule, see Findings at 57, 82a, and decision on summary judgment motion, 515 F.Supp. at 718-719, 117a-118a.

If the appeals court believed that an incorrect legal standard in fact had been applied, it would have had to remand for further proceedings. See Pullman-Standard v. Swint, 456 U.S. 273, 291-292 (1982).

publisher's slashing of the budget and press run, and its intentional withholding of efforts to sell the book. It was essentially on this basis that the appeals court reversed.

The Second Circuit panel introduced its analysis of the facts as follows:

> Although the literary or scholarly merits of the book are not our concern, its nature, tone and marketability among various audiences are key facts in this litigation, for they bear upon the book's prospects for commercial success and illuminate the negative reactions which later set in at P-H.

717 F.2d at 674, 4a. Despite this disclaimer, however, the court proceeded precisely to render its opinion of "the literary or scholarly merits of the book," as well as its own business judgment as to "marketability":

> In the American market, the book's appeal is somewhat limited by the fact that it is not a work critical

> of business on grounds that reform of capitalism is necessary in order to save it, a viewpoint with mainstream appeal. Rather it presents a Marxist view of history.

Id. at 674-675, 5a.

In the course of the opinion, the court continued to express its negative view of the book: a member of the Du Pont family was "predictably outraged" by it, id. at 675, 5a-6a (emphasis added); the Fortune Book Club's contract cancellation was "an inevitable result" of one of its executive's reading the book, id., 7a (emphasis added); a particular passage--deleted in the editing process and thus having no bearing on the book's quality or sales potential--was "not only unfounded but also irrelevant," id. at 676, 7a; the district court's conclusion on marketability was "highly optimistic." Id. at 681-682, 20a. What the trial

judge found to be a "drastic unexplained cutting of the advertising budget and...print order, which in turn allowed the Book to go out of print just as it began to gain sales momentum," Findings at 73, 99a, was transformed by the appeals court into a circumstance with virtually the opposite meaning:

> Judge Brieant found only that an "unexplained" reduction in the first printing and advertising budget caused the book to go out of stock for a brief period of time and prevented the exploitation of growing sales momentum.

717 F.2d at 681, 19a.

The Court of Appeals correctly stated the applicable legal standard: "We think the promise to publish must be given some content and that it implies a good faith effort to promote the book including a first printing and advertising budget adequate to give the

book a reasonable chance of achieving market success in light of the subject matter and likely audience." 717 F.2d at 680, 17a. It added that Zilg could show a breach of contract in two ways: inadequate initial printing and promotional efforts; or failure to make even greater efforts for other than a good-faith business reason. Id. at 681, 18a. Despite the district court's express findings to the contrary, the panel then asserted that Zilg had not shown that Prentice-Hall's initial printing and promotional efforts fell short or that its later decisions were based on other than good-faith business judgments. Id. at 681, 18a. The panel simply ignored the trial court's explicit findings that (1) the initial printing was not adequate since the one-third cut in the print run prevented

the company from filling orders beyond 10,000 copies at precisely the time that sales were building; (2) the $9,500 reduction in advertising budget "took the heart out of the advance sale momentum which the book had generated"; (3) promotional efforts were intentionally withheld; and (4) Prentice-Hall's own asserted reason for cutting the press run was "simply not true...a fabrication."

REASONS FOR ALLOWING THE WRIT

A. The Case Presents an Important and Novel Question Under the First Amendment Equality Principle: Whether a Court of Appeals May Deprive an Author of a Judgment Against His Publisher on the Explicit Basis of That Court's Disagreement With the Political Point of View of the Author's Book.

The Court of Appeals reversed the petitioner's judgment against Prentice-Hall on the explicit basis of

its own prognostication that the book's appeal was limited because "it is not a work critical of business on grounds that reform of capitalism is necessary in order to save it, a viewpoint with mainstream appeal." 717 F.2d at 674-675, 5a. This was not a description of Prentice-Hall's state of mind, either as asserted by the company or as found by the district court; rather, it was the appeals court's independent judgment. The court thus applied a purely content and viewpoint-based test in overruling the trial judge. It is petitioner's contention that a federal court may no more discriminate in this fashion on the basis of its aversion to the content or point of view of protected expression than may other agencies of government.

Of all First Amendment principles

one of the most fundamental is that government may not discriminate against speech on the basis of its viewpoint or its content. As this Court said in Police Department of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972), "There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard," quoting A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948). This "equality principle" is crucial to an underlying purpose of the First Amendment--the free flow of ideas. See generally Karst, "Equality as a Central Principle in the First Amendment," 43 U.Chi.L.Rev. 20 (1975).[5]

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[5]Sometimes, as in Mosley, equal protection principles as embodied in the Fifth and Fourteenth Amendments are invoked to explain the (fn cont'd)

The equality principle in First Amendment jurisprudence has been consistently reaffirmed. See, e.g., Widmar v. Vincent, 454 U.S. 263, 276 (1981); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 537-538 (1980); Carey v. Brown, 447 U.S. 455, 461-464 (1980); First National Bank of Boston v. Bellotti, 435 U.S. 765, 784-787 (1978); City of Madison v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-176 (1976). In each of these cases, regardless of the factual context, this Court has made clear that government cannot be permitted "the choice of permissible subjects for public debate,"

(fn cont'd) importance of nondiscrimination by government in regulating expression. See also Williams v. Rhodes, 393 U.S. 23, 30-34 (1968).

Consolidated Edison, supra, 447 U.S. at 538; cannot by its actions "attempt to give one side of a debatable public question an advantage in expressing its views to the people," First National Bank, supra, 435 U.S. at 785; cannot "discriminate between speakers on the basis of...the content of their speech." City of Madison, supra, 429 U.S. at 176.

Even in those situations where an organ of government, by virtue of its special role in the community, does have some discretion in this area of distinctions based on content, it may not exercise that discretion "in a narrowly partisan or political manner," Board of Education, Island Trees Union Free School District v. Pico, 457 U.S 853, 870 (1982), or one that imposes "a political orthodoxy," id. at 875.

"[C]ertain forms of state discrimination between ideas are improper," id. at 878-879 (Blackmun, J., concurring) (emphasis in original), particularly where state action is "calculated to suppress novel ideas or concepts." Id. at 880. Since the Court of Appeals in this case was not vested with even that element of discretion held by the school board in Pico, its overt "discrimination between ideas" was an unconstitutional ground for decision. It is no more permissible for a court to decide that a book is not marketable because of its viewpoint or style than for a court to decide that highly charged or politically unpopular speech is unprotected.[6] Cox v. Louisiana,

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[6] The appeals court's judgment was not only constitutionally proscript but without basis. It is (fn cont'd)

379 U.S. 536, 546-557 (1965).

A second bedrock First Amendment principle is that, of all forms of expression, discussion of public issues occupies the "highest rung in the hierarchy" of free speech values. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); New York Times Co. v. Sullivan, 376 U.S. 254, 269-273 (1964); Terminiello v. Chicago, 337 U.S. 1, 4 (1949). Petitioner's highly critical portrayal of the Du Ponts and their role in American history was penultimately a

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(fn cont'd) parochial to assert that there is not a market among American readers for almost any point of view. Works by authors commonly considered leftist or Marxist have proven quite marketable in the United States over the years. Jean-Paul Sartre, Simone de Beauvoir, and Bertolt Brecht might be mentioned among Europeans; Pablo Neruda among Latin Americans; and, of home-grown authors, W.E.B. Du Bois or the young John Dos Passos.

discussion of public issues; and the Court of Appeals disfavored it precisely for this reason, as the opinion amply reveals.[7]

Petitioner acknowledges that in litigation involving book publishing and other forms of free expression, judicial evaluation of an author's subject, style, and even viewpoint may sometimes be unavoidable. In such situations, courts must be confined to testing the honesty--or perhaps the reasonableness--of the publisher's

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[7] There can be no question that the First Amendment applies to actions by the courts as by other organs of government; indeed, many of the landmarks in First Amendment jurisprudence involved judicial acts. E.g., New York Times Co. v. United States, 403 U.S. 713 (1971) (prior restraint); New York Times v. Sullivan, supra, 376 U.S. at 265 (application of common law); Bridges v. California, 314 U.S. 252 (1941) (citation for contempt of court).

assertion of good faith. Even when the inquiry is cabined in this way, a court's assessment of the "reasonableness" of a publisher's decision, for example, to reject a manuscript, may be constitutionally problematic; the issue ought to be "the honesty, not the reasonableness, of the publisher's decision." Healy & Alonso, "Authors' Rights: Waiver, Estoppel, and Good Faith in Book Publishing Contracts," 15 N.E.L.Rev. 485, 509 (1980).

When the issue is the good faith of promotion or marketing decisions, a court's judgment on reasonableness may be inevitable; but the constitutional sensitivity of the judgment should be acknowledged. A court must therefore be careful to restrict its inquiry to the honesty and reasonableness of the

publisher's articulated business judgments and not wander off into literary criticism or polemic of its own, as the appeals court did in the present case.[8]

Difficult constitutional questions could arise if a judicial assessment of a publisher's reasonableness became

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[8] Although the district court had noted the possibilities that one executive's "embarrassment" over the book, or pressure from Du Pont, may have contributed to Prentice-Hall's decision to "privish," see Findings at 64-65, 89a; 54, 80a, it ultimately found that attributing a particular motive or motives to the company's intentional withholding of promotional and sales efforts was unnecessary. Id. at 64, 88a. Prentice-Hall did not defend its actions as "reasonable" or "good faith" responses either to concerns about content and style or to Du Pont intervention. The company defense, as noted, was that it reduced the press run and budget because (a) it thought 5,000 volumes were to go to Book of the Month Club; and (b) the $15,000 advertising budget was only "tentative"--defenses expressly rejected by the district court.

unduly colored by disagreement with or animus toward a work or its author. Whatever constitutional lines might be drawn in this legal area, however, it should be clear that the First Amendment prohibits a court from independently making viewpoint-based distinctions to the detriment of an author who espouses what the court perceives to be unpopular views, as was done in this case. Although the appellate panel's opinion is hardly a model of clarity or analytic precision, it is clear that the court's independent assessment of the merits of Zilg's book played a determinative role in the ultimate result.

Whatever lines might be drawn in cases where courts accept (or reject) publishers' claims of "reasonableness" in assessing a work's potential, it cannot be constitutionally proper for an

appellate court, ignoring a trial judge's specific findings that efforts to promote and sell a book were intentionally withheld, to overturn a breach of contract judgment on the basis of its own subjective view of the book's worth. As in Pico, supra, the distinction between permissible judgments about "reasonableness" (in that case, about the educational value of literary works) and impermissible judgments based on political partisanship or desire to suppress, may be difficult, but that magnifies rather than diminishes the constitutional importance of drawing the line. In the present case, the line-drawing is not difficult, however, because the appeals court's judgment was not anchored in any finding that the publisher reasonably believed the book would not sell because

of its viewpoint or style. On the contrary, the trial court expressly disclaimed any finding that "embarrassment" on the part of one executive accounted for Prentice-Hall's slashing of press run and advertising budget and intentional withholding of sales efforts. Nor did Prentice-Hall defend on any such theory. See note 8, supra.

The constitutional magnitude of the appeals court's error in this case can be appreciated if one reverses the roles and posits a "leftist" court passing judgment on the marketability of, for example, a book that it perceived as "pro-capitalist" or as advocating "reform" of the economic system instead of advocating what the court thought was a "Marxist view of history." Whether innocently assuming that its own adverse

reactions would be shared by the reading public, or whether less innocently attempting to punish the writer or reward suppression of his work, a court would clearly violate First Amendment principles if it deprived the author of a judgment based on these ideological considerations. Similarly, a court of "male chauvinist" judges could not constitutionally deprive a "feminist" author of a judgment by determining that his or her book had limited appeal--whether because it thought feminism unpopular, old-hat, or simply un-American--any more than a court of "feminist" judges could discriminate in this sense against a work offensive to their moral or political view of the world.

The present case poses the novel question whether the fundamental

principles underlying the First Amendment apply to an appeals court when it chooses to deprive an author of a judgment against his publisher on the explicit basis of its "disagreement with the content" of the work, Young v. American Mini Theatres, Inc. 427 U.S. 50, 64 (1976), its distaste for the "novel ideas or concepts" advocated by the author. Board of Education v. Pico, supra, 457 U.S. at 880 (Blackmun, J.). For although the appeals court built its opinion upon an assumption (unsupported by the trial court's findings) that Prentice-Hall acted in good faith, it is evident that this factual analysis was colored by--in fact, turned entirely upon--the panel's view that because Zilg did not advocate "reform of capitalism," his book therefore did not have "mainstream appeal." This conclusion is

so tainted by impermissible judgments about the potential responsiveness of the reading public to purportedly non-mainstream points of view in the marketplace of ideas that it cannot be allowed to stand.[9]

The appeals court's intellectual manipulation of the appellate process through constitutionally proscript distinctions should not go unreviewed. Both for the sake of the free marketplace of ideas on which our democracy depends, and for the benefit and guidance of future courts,

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[9] It also contradicts the professional judgments of Prentice-Hall in projecting sales, the actual advance sales, the immediate popularity of the book in Delaware, and the trial court's express finding that the book was permitted to go out of print just as sales momentum was building. See Findings at 10-11, 26, 63-64, 81, 33a-34a, 51a-52a, 87a-88a, 108a.

Indeed the former chairman of the Council of Economic Advisers, Leon Keyserling, supplied a very favorable review to Prentice-Hall (fn cont'd)

publishers, authors, and other artists and entertainers,[10] the petitioner should not be deprived of his judgment because an appeals court panel disliked his book. Accordingly, this Court should grant a writ of certiorari to resolve the question raised by the petition to and clarify the proper application of First Amendment equality principles to the appellate function of the federal courts.

B. The Appellate Court So Clearly Exceeded its Authority Under Rule 52(a) That Justice Demands Granting the Writ.

The Court of Appeals never stated that the trial judge's findings were clearly erroneous; indeed, it never

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(fn cont'd) for promotional use, stating that the book was "fascinating" and "should not be overlooked." Joint Appendix in United States Court of Appeals for the Second Circuit, Nos. 82-7335, 82-7425 at JA 208.

[10] The importance of the issue is underscored by the participation of the Authors League of America as amicus curiae in the Court of Appeals.

mentioned Rule 52(a). An examination of its opinion, however, reveals that the judgment turned on disagreement with Judge Brieant's fact findings that Prentice-Hall intentionally withheld sales efforts and did not act in reasonable good faith when it slashed the advertising budget and press run for the book. The appeals court asserted that Zilg had not demonstrated that Prentice-Hall's actions were premised on "reasons other than a good faith business judgment," 717 F.2d at 681, 18a--a factual conclusion directly contrary to that of Judge Brieant.

In Pullman-Standard v. Swint, supra, this Court reversed the judgment of a Court of Appeals that had made its own determination on the issue of intent in an employment discrimination case without explicitly holding the trial

judge's contrary findings to be clearly erroneous. While noting the "vexing nature of the distinction between questions of fact and questions of law," 456 U.S. at 288, this Court reiterated what it had said in Dayton Board of Education v. Brinkman, 443 U.S. 526, 534 (1979)--that the question of intent to discriminate is "essentially factual, subject to the clearly erroneous rule." Pullman-Standard, supra, 456 U.S. at 288.

The Court has since reaffirmed in other contexts the importance of the Rule 52(a) limitation on appellate review. Rogers v. Lodge, 458 U.S. 613, 622-623 (1982); Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 855-858 (1982). As this Court explained in the unanimous Inwood decision:

> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply

> because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent."

Id. at 857-858, quoting United States v. Real Estate Boards, 339 U.S. 485, 495 (1950).

Pullman-Standard and its successors require reversal in the present case. It is difficult to conceive of factual determinations that are more appropriately relegated to the trial judge who has observed the witnesses and who has firsthand familiarity with the evidence than are those respecting the good faith and soundness of Prentice-Hall's asserted business judgments.

The appeals court blurred the distinction between factual and legal conclusions when it stated that the

district judge's finding as to lack of good faith, sound business reasons "does not support the conclusion that the contract was breached." 717 F.2d 681, 20a. The Court of Appeals had stated just one paragraph earlier that the applicable legal test was whether the plaintiff proves that the publisher's motivation "was not a good faith business judgment." Id. This was precisely what the trial court did find, both as to the decisions to cut the initial press run and advertising budget, and as to the failure to undertake "greater printing and promotional efforts...for reasons other than a good faith business judgment," a second form of breach of contract according to the very standard set forth by the appeals court. Id., 18a.

The panel criticized the trial court

for what it called "second guessing" the business judgments of the publisher. Id. It did not say why its own opinion as to marketability should be substituted, however, or why, indeed, it conceived that Judge Brieant's specific findings of intentional withholding of promotional efforts, of fabrication, and of damage to the book's sales at a critical time amounted to second guessing. It is plain that the Court of Appeals violated Rule 52(a) as well as this Court's unmistakable messages in Pullman-Standard, Rogers, and Inwood.

Rule 52(a) requires an appeals court reversing a trial judge's fact findings to state unambiguously that the trial judge clearly erred. The rule cannot be diluted by post-hoc arguments from inference that the appeals court must have or might have thought the trial

court's findings to be clearly erroneous. Indeed, this is one of the lessons of Pullman-Standard, supra, 456 U.S. at 290-291, where despite the Court of Appeals' references to Rule 52(a), this Court held that the language of the opinion "strongly suggests that the outcome was the product of the Court's independent consideration of the totality of the circumstances it found in the record," rather than the product of applying the rule. The same observation applies to the present case, where the appeals court overturned fact findings without even a reference to Rule 52(a). Thus, there can be no argument in this case that the Second Circuit panel somehow did consider and apply Rule 52(a), sub silentio.

Nor is this a case in which an appellate court conducted de novo review

of findings of constitutional fact, for example whether a book is obscene, a statement is defamatory, or a speech creates imminent danger. In such situations, Rule 52(a) does not apply and appellate courts must make independent judgments "in applying constitutional standards" to issues of fact. Jacobellis v. Ohio, 378 U.S. 184, 188 n.3 (1964). See also New York Times v. Sullivan, supra, 376 U.S. at 284-285. The good faith of Prentice-Hall in this case was not an issue of constitutional fact, nor did the publisher ever so argue.

The district court found that Prentice-Hall "privished" the Du Pont book without good faith or sound business reasons, rejecting the reasons given as pretextual. The district court's fact findings against

Prentice-Hall thus did not implicate any constitutional issue, either as to the book's protected status or as to its literary or scholarly worth.[11] The appeals court simply reversed these findings, and applied its own judgment that the book was not widely marketable. The fact that the appeals court violated the equality principle of the First Amendment in the course of its reasoning does not mean that any question of constitutional fact was presented to it by Judge Brieant's decision against Prentice-Hall. Thus, the First Amendment issue in this case, unlike that before this Court in Bose v.

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[11] Indeed, despite his evident personal dislike for the book, Judge Brieant did not permit his own opinion of it to infect his fact findings on the issue of good faith, sound business judgment--a separation that the appeals court was not able to effect.

Consumer's Union, No. 82-1246, is distinct and separate from the appellate court's failure to adhere to Rule 52(a) in reversing findings respecting intentional withholding of sales efforts and good faith business judgments.

Allowance of the writ is particularly important in this case because the Court of Appeals ignored the unmistakable message of Pullman-Standard, Rogers, and Inwood, thus implicitly rejecting this Court's instructions and requiring exercise of this Court's supervisory function. (See Rules of the Supreme Court 17.1(a)). Ultimately, proper enforcement of Rule 52(a) should reduce the number of appeals and thereby the workload of the federal appellate courts.

Wholly aside from the Rule 52(a) violation, however, the panel's judgment

was premised on an antipathy to the viewpoint and style of the book that was not anchored in any finding about the publisher's credibility or state of mind. Depriving an author of damages awarded after careful factfinding, on the basis of an appeals court's opposition to the content of the author's protected speech, is so manifest an injustice, and one so constitutionally ominous, that it should not go unredressed.

CONCLUSION

For the foregoing reasons this Court should allow the writ of certiorari. If the Court does not believe that full briefing and argument are necessary, it

should grant the writ and summarily reverse the judgment of the Court of Appeals.

Respectfully submitted,

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February 14, 1984

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Appendix A.

Gerard Colby ZILG,
Plaintiff-Appellee-Cross-Appellant,

v.

PRENTICE-HALL, INC.,
Defendant-Appellant,

and

E.I. DuPont de Nemours & Co., Inc.,
Defendant-Cross-Appellee.

No. 620, Dockets 82-7335, 82-7425.

United States Court of Appeals,
Second Circuit.

Argued Nov. 22, 1982.
Decided Sept. 1, 1983.

Before WATERMAN, PIERCE and WINTER, Circuit Judges.

WINTER, Circuit Judge:

Prentice-Hall, Inc. ("P-H") appeals from a judgment entered after a bench trial before Judge Brieant ordering it to pay damages of $24,250 plus pre-judgment interest to the plaintiff, Gerard Colby Zilg, for breach of contract. Zilg cross-appeals the judgment in favor of E.I. DuPont de Nemours & Co., Inc. ("DuPont Company") on his claim of tortious interference with contract. We reverse as to Zilg's breach of contract claim against P-H and affirm the judgment in favor of the DuPont Company.

BACKGROUND

Gerard Colby Zilg is the author of *DuPont: Behind the Nylon Curtain*, an historical account of the role of the DuPont family in American social, political and economic affairs. Early in 1972, after one partially successful and several unsuccessful efforts to find a publisher for his proposed book, Zilg's agent introduced him to Bram Cavin, a senior editor in P-H's Trade Book Division. Cavin expressed interest in the book, and he and Zilg submitted a formal proposal to John Kirk, P-H's Editor-in-Chief at that time. Kirk approved the proposal, which described the future book as

> a thoroughly documented study of the major role the DuPont family has played in the development of modern America and its corporate and social institutions. After skimming lightly over the family's origins in France and its development of its gunpowder business up to and through the Civil War, the book will concentrate on the period after that conflict right down to the present day. The story—essentially one of money and power—is going to be told in human terms and in the lives of the members of the family and their actions. The family will be looked upon as a unit in its relations to the outside world. But it will also be shown to be, as many families frequently are, one torn by feuds and struggles over the money and the power.

As it passed through the editorial and corporate hierarchy, the proposal received a notation from P-H's publicity director that the book's potential for radio and television coverage was "slight to non-existent unless matter in [the] book is highly controversial and print [media] says so first."

P-H and Zilg executed a form contract which provided in relevant part:

> 3. The manuscript . . . will be delivered . . . by the AUTHOR to the PUBLISHER in final form and content acceptable to the PUBLISHER. . . .
> 4. When the manuscript has been accepted and approved for publication by the PUBLISHER . . . it will be published at the PUBLISHER'S own expense. . . .
> 12. The PUBLISHER shall have the right: (1) to publish the work in such style as it deems best suited to the sale of the work; (2) to fix or alter the prices at which the work shall be sold; (3) to determine the method and means of advertising, publicizing, and selling the work, the number and destination of free copies, and all other publishing details, including the number of copies to be printed, if from plates or type or by other process, date of publishing, form, style, size, type, paper to be used, and like details.

Zilg submitted the first half of his completed manuscript to Cavin in November, 1972, and the remainder a year later. Cavin authorized acceptance of the work on behalf of P-H, apparently without the participation of Peter Grenquist, who had become president of P-H's Trade Book Division sometime after execution of the contract but before submission of the manuscript. P-H's legal division scrutinized the manuscript for libelous content and concluded that, if a libel action were brought, P-H "would ultimately prevail" because the subject matter of the work was constitutionally privileged and the plaintiffs would have to prove actual malice. The division's opinion noted, however, that litigation against the DuPonts would be very costly.

A decision was made to accept the manuscript which was distributed to selected wholesalers, reviewers, and booksellers. Copies were also sent to the editorial director of the Book of the Month Club ("BOMC"). Although BOMC decided not to offer the book as a selection of its main club, a subsidiary, the Fortune Book Club, which appealed to a readership composed largely of business executives, did choose it as a selection.

A committee of various P-H department representatives, including the book's editor, met on March 28, 1974 to discuss production plans. The sales estimates of committee members varied from 12 to 15 thousand copies for the first year although by May two members were predicting sales of only 10 thousand. Estimates of from 15 to 20 thousand sales over a five year period were also made. Cavin, an ardent supporter of the book, made estimates of 20 to 25 thousand in the first year and 25 to 35 thousand over five years. The committee decided on a first printing of 15,000 copies at a retail price of $12.95 per copy. At a later meeting, the committee decided to devote roughly $15,000 to advertising.

Although the literary or scholarly merits of the book are not our concern, its nature, tone and marketability among various audiences are key facts in this litigation, for they bear upon the book's prospects for commercial success and illuminate the negative reactions which later set in at P-H. The book is a harshly critical portrait of the DuPont family and their role in American social, political and economic history. Indeed, it is a harshly critical portrait of that history itself. The reactions of readers and reviewers in the record indicate that the book is polarizing, the difference in viewpoint depending in no small measure upon the politics of the beholder. A significant number of readers regard the book as a strident caricature, drawing every conceivable inference against the DuPont family and firms with which members of the family were or are as-

sociated. One judge at BOMC, for example, described it as "300,000 words of pure spite." On the other hand, the book has a loyal band of admirers. It received a favorable review in many newspapers, including the *New York Times* Book Review section. Its comprehensiveness and the extensive research on which it was based were frequently noted. The book also has some appeal to another audience, namely readers with a taste for gossip about the rich and powerful, particularly readers in Delaware. Indeed, it was once first in non-fiction sales in that state.

In the American market, the book's appeal is somewhat limited by the fact that it is not a work critical of business on grounds that reform of capitalism is necessary in order to save it, a viewpoint with mainstream appeal. Rather, it presents a Marxist view of history. Also weighing against its overall marketability were its size (586 pages of text, 2 inches thick, three and one-half pounds), complexity (almost 200 family members with the surname DuPont and 170 years of American history) and price ($12.95 in 1974 dollars).

Prior to June, 1974, Grenquist appears not to have been aware of the nature and tone of the book, of the intensity of negative feeling it might arouse in some readers or of evidence of serious inaccuracies. He may have been reassured partly by Cavin's enthusiasm and partly by the book's selection by the Fortune Book Club. That selection itself remains something of a mystery since the Club's inside reader concluded it was "a bad book, politically crude and cheaply journalistic." However, instead of accepting his recommendation that it "be fed back to the author page by page," BOMC contracted with P-H to have it adopted by the Fortune Book Club.

In June, 1974, a chain of events was set in motion which apprised Grenquist of the negative aspects of Zilg's work. A member of the DuPont family obtained an advance copy of

the manuscript from a bookseller and, predictably outraged, turned it over to the Public Affairs Department of the DuPont Company. Members of that department sought to locate individuals in P-H's management whom they knew personally in order to speak privately about the book, but to no avail. They advised the family member to do nothing before the book was published.

In July, the DuPont Company learned that the book had been accepted as a Fortune Book Club selection and decided to act before publication anyway. Harold Brown of DuPont ("DuPont-Brown") telephoned Vilma Bergane, a manager of Fortune Book Club, having received her name from the managing editor of *Fortune Magazine*. He told her that the book had been read by several persons, some of whom were attorneys, and that the book was "scurrilous" and "actionable." Bergane passed on a version of DuPont-Brown's remards to F. Harry Brown, Editor-in-Chief of BOMC ("BOMC-Brown"). DuPont-Brown then told BOMC-Brown that DuPont family attorneys found the book abusive and that he was to try to locate someone at P-H with whom to discuss the book. He also told BOMC-Brown that the DuPont Company did not intend to throw its weight around. BOMC-Brown referred DuPont-Brown to Peter Grenquist at P-H.

Some days later, apparently in an effort to quash rumors or inaccurate messages to the contrary, DuPont-Brown phoned Grenquist to assure him that DuPont was not attempting to block publication of the book, initiate litigation, or even approach P-H in any kind of adversarial posture. One such rumor, allegedly passed on to Cavin by an editor at BOMC who does not remember the conversation, was that DuPont had gone to *Fortune Magazine* and threatened to pull all its advertising. *Fortune*, owned by Time, Inc., had no connection with the Fortune Book Club at this time.

Meanwhile, BOMC-Brown decided to look into the matter personally. Over the July 27-28 weekend, he "spent a horrible two days reading" the book and decided it was an unsuitable selection for the Fortune Book Club. He later stated he felt no pressure from the DuPont Company in reaching this decision. In view of the nature of the book and the Club's audience of business executives, his decision seems an inevitable result of his reading the book. BOMC immediately notified P-H of its decision not to distribute the book. The reason given was BOMC's belief that the book was malicious and had an objectionable tone.

P-H's own detailed examination of the manuscript may also have introduced or heightened skepticism on Grenquist's part. A toning down was found to be necessary even after the book was in page proof. Mistakes of fact, such as a statement that Irving S. Shapiro (DuPont's Chief Executive Officer) had served as an Assistant District Attorney in Queens County, New York, were discovered. More serious matters also came to light. The original manuscript attacked Judge Harold R. Medina for matters irrelevant to the DuPonts and in a fashion which the district court characterized as libelous. Zilg admitted at trial that there was no factual foundation for this attack. Some eyebrows at P-H may well have been raised when this passage was discovered and deleted, since it was not only unfounded but also irrelevant.

P-H continued to correct and tone down the book, hoping to reverse BOMC's decision not to offer it through the Fortune Book Club. A certain defensiveness also began to creep into P-H's attitude toward the book. On August 2, Grenquist circulated a memorandum which noted that questions had arisen regarding both the tone of the book and Zilg's approach and recommended that the adjective "polemical" henceforth be used because "[t]he book is a polemical argument and no pretense is

made that it is anything else." More importantly, he also cut the first printing from 15,000 copies to 10,000, stating that 5,000 copies were no longer needed for BOMC. The proposed advertising budget was also slashed from $15,000 to $5,500.

Judge Brieant held that the DuPont Company had a constitutionally protected interest in bringing the "scurrilous" nature of the book and its unsuitability as a Fortune Book Club selection to the attention of senior officials at BOMC and P-H. He expressly found that the Company did not engage in coercive tactics but limited its actions to the expression of its good faith opinion.

As to P-H, Judge Brieant found that the publishing contract required the publisher to "exercise its discretion in good faith in planning its promotion of the Book, and in revising its plans." This obligation required that Prentice-Hall use "its best efforts . . . to promote the Book fully and fairly." He held that P-H breached this obligation because it had no "sound" or "valid" business reason for reducing the first printing by 5,000 volumes and the advertising budget by $9,500, which allowed the book to go briefly out of stock (although wholesalers had ample copies) just as it gained sales momentum. He expressly found that since BOMC did its own printing of club selections, the first printing cut could not be attributed to the cancellation of the BOMC order. He also found that the book would have sold 25,000 copies had P-H not taken these actions.

Having concluded that P-H had no sound or valid business reason for reducing the first printing and advertising budget, Judge Brieant held that P-H "privished" Zilg's book on the basis of the testimony of plaintiff's expert, William Decker. Decker testified that publishers often mount a wholly inadequate merchandising effort after concluding that a book does not meet prior expectations in either quality or marketability. Such "privishing" is intended to fulfill the technical require-

ments of the contract to publish but to avoid adding to one's losses by throwing "good money after bad."

DISCUSSION

We agree with Judge Brieant that DuPont did not tortiously interfere with Zilg's beneficial commercial relationships. We disagree, however, with his conclusion that P-H breached its contract with Zilg and reverse that judgment.

1. *Tortious Interference by DuPont*

Judge Brieant held that DuPont's approach to BOMC and subsequent communications with P-H were protected by the First Amendment. We affirm, but on the narrower grounds that these activities are not tortious under New York law.

The parties agree that New York law applies and that New York courts would follow the Restatement (Second) of Torts (1977). *Guard-Life Corp.* v. *S. Parker Hardware Manufacturing Corp.*, 50 N.Y.2d 183, 406 N.E.2d 445, 428 N.Y.S.2d 628 (1980). The Restatement visits tort liability upon an actor who "intentionally and improperly" interferes with contractual relations between others by causing a party to those relations not to perform. Restatement (Second) of Torts § 766 (1977). We will assume that DuPont's actions were a cause in fact of BOMC's decision not to offer the book as a Fortune Book Club selection and of P-H's alleged breach of contract. We now turn to the propriety of DuPont's conduct.

Section 767 of the Restatement catalogues the factors considered in evaluating the propriety of interference with contractual relations. The section reads:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes,
> (d) the interests sought to be advanced by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference and
> (g) the relations between the parties.

[1] As to section 767(a), the nature of the DuPont Company's conduct, Judge Brieant found that it did not entail threats of economic coercion or baseless litigation but was limited to a good faith expression of views about the merits, objectivity and accuracy of the book. We agree. The length and breadth of the evidence of economic coercion is a conversation between two parties without firsthand knowledge, which only one recalls. Moreover, it involved Time, Inc., which had nothing to do with publication or distribution of the book. As to threats of litigation, DuPont did convey to BOMC its view that the work was "actionable." Since BOMC was completely indemnified under its contract with P-H, it is unlikely that the remark, made only to BOMC, was coercive to BOMC. In any event, representatives of the DuPont Company quickly informed both BOMC and P-H that it had no intention of suing.

As to section 767(b), the DuPont Company's motive, the record amply demonstrates that it desired to bring to the attention of BOMC and, later P-H, what it in good faith believed were plainly negative aspects of the book. It wanted to expose those negative aspects in the hope of causing BOMC to abandon its plans and of inducing P-H to reconsider publication without substantial revision.

Zilg just as clearly had an interest, section 767(c) in the Restatement, in avoiding these very consequences since publication under his contract with P-H and selection by the Fortune Book Club (assuming, without deciding, that relationship to be contractual) would enhance the dissemination of his views, enrich him, and might also launch him on a career as a well known author.

[2] Conversely, the DuPont Company had a substantial interest, section 767(d), in communicating its views to BOMC and to P-H. While much of the book's accusatorial material related to specific family members, the company itself could reasonably believe that it might suffer damage to its public image and good will if the book was given widespread credence. For most of the period covered by the book the company was controlled and operated by various members of the family who are the subjects of Zilg's attacks. The title itself, *DuPont: Behind the Nylon Curtain*, seems more a reference to the company than to the family. The index contains roughly one half of one page of small print references to the company and the book suggests that the company is guilty of ongoing antitrust violations. The book also contains at attack on Irving Shapiro, at publication time the company's Chairman of the Board, but not a DuPont family member, which states, *inter alia*, that he was "of witch-hunting fame during the McCarthy era," that "his story is one of success through persecution and disgrace" and that he "never relented on these sorry days," descriptions

arrived at as a consequence of Shapiro's role as an Assistant United States Attorney in a Smith Act trial. We regard Zilg's argument that only family members had a cognizable interest in commenting on the book as ignoring the reality of the circumstances and the character of the book itself.

The author of this opinion respectfully disagrees with Judges Waterman and Pierce that the inquiry required by Restatement section 767(e), the interests of society, is satisfied by the finding that DuPont acted in good faith and in a noncoercive manner in pursuing its interest in protecting its name. If that were the case, there would be no need for a subsection (e) since it would be adequately covered by subsections (a) and (d). I believe, therefore, that a particularized discussion of the interests of society in promoting or deterring the communication of good faith views about the merits of a literary work to publishers and book clubs is necessary.

Such communications seem to me socially beneficial because they promote the free flow of ideas. Zilg argues that such communications should be privileged only when made to the public at large. I see no basis for such a limitation. There is no self-evident harm in book clubs and publishing houses learning what the targets of a harsh "polemical argument" believe about the merits of that argument. Such firms surely have, or ought to have, an interest in avoiding unjustified attacks as well as factual error, and such information aids in achieving those goals. It is amply clear in the record that book clubs and publishing houses are not monolithic organizations which immediately absorb all relevant information and distribute it evenly throughout the firm hierarchy. Rather, they are overworked bureaucracies which channel information selectively and can be prone to error because of scant or inaccurate information.

This seems to have been the case at P-H, for both Cavin's enthusiasm and the wholly misleading signal from the Fortune Book Club appear to have misled Grenquist and perhaps others as to the character of the book and the highly negative response it would meet in some quarters. Certainly the book was something other than the original proposal's description of a "story . . . of money and power . . . told in human terms and in the lives of the members of the family and their actions." Moreover, once Grenquist was apprised of the problems of tone and factual inaccuracies, P-H revised the book with Zilg's permission.

As to BOMC and Fortune Book Club, there can be no doubt of their interest in receiving the communication from the DuPont Company since the book was an utterly inappropriate selection for the Club. Book clubs have a strong interest in avoiding the wrath of their members and such communications further this interest.

Society benefits from such communications because they increase the information available to publishers and book clubs and thus aid those firms in meeting the desires of potential purchasers. The reading public has an interest both in the accuracy and literary merit of available books and in an efficient means of learning about works of particular interest to particular readers. To the extent that targets of "polemical argument" are able to communicate with publishers, accuracy and merit may be enhanced. To the extent they are able to communicate with book clubs, particular readers are more likely to be exposed to accurately pre-selected items of interest to them.

As to section 767(f) and (g), the DuPont Company's actions surely resulted in BOMC's decision not to distribute the book as a Fortune Book Club selection and, either because of its direct communications to P-H or the BOMC decision, caused

the change in Grenquist's attitude toward the book. So far as the relations of the parties are concerned, it is enough to note that Zilg fully intended his work to be the harsh attack it was.

[3] After weighing the factors comprising section 767, we hold that the DuPont Company's conduct in communicating its views on Zilg's book was not tortious. Authors have no exclusive right to the ear of those who disseminate their works, for intelligent decisions by publishers and others distributing books are enhanced by the free flow of information. So long as the expression of views is done in good faith and in a non-coercive way, it is not tortious. This result is fully supported by our recent decision in *Hammerhead Enterprises, Inc.* v. *Brezenoff*, 707 F.2d 33 (2d Cir.1983), holding that the First Amendment protects communications by a municipal welfare official to department stores asking them not to stock a parlor game mocking the system of public assistance.

2. *P-H's Breach of Contract*

We believe Judge Brieant's discussion of P-H's obligations under its contract with Zilg, and his finding of a breach of those obligations, is more troubling than his dismissal of the case against the DuPont Company. Judge Brieant read the contract in question to oblige P-H "to use its best efforts . . . to promote the Book fully. . . ." and found that the decision to cut the first printing and original advertising budget resulted in a loss of sales momentum when the book was briefly out of stock. These actions by P-H, he held, breached its agreement with Zilg because they lacked a sound or valid business reason.

[4] Putting aside for the moment P-H's motive in slashing the first printing and advertising budget, we note that Zilg neither bargained for nor acquired an explicit "best efforts" or "promote fully" promise, much less an agreement to make cer-

tain specific promotional efforts. The contract here thus contrasts with that in issue in *Contemporary Mission, Inc.* v. *Famous Music Corp.*, 557 F.2d 918 (2d Cir.1977), which contained specific promotional obligations with regard to a musical group. While P-H obligated itself to "publish" the book once it had accepted it, the contract expressly leaves to P-H's discretion printing and advertising decisions. Working as we must in the context of a surprising absence of caselaw on the meaning of this not uncommon agreement, we believe that the contract in question establishes a relationship between the publisher and author which implies an obligation upon the former to make certain efforts in publishing a book it has accepted notwithstanding the clause which leaves the number of volumes to be printed and the advertising budget to the publishers' discretion. This obligation is derived both from the common expectations of parties to such agreements and from the relationship of those parties as structured by the contract. See *generally* Goetz and Scott, *Principles of Relational Contracts*, 67 Va.L.Rev. 1089 (1981).

Zilg, like most authors, sought to take advantage of a division of labor in which firms specialize in publishing works written by authors who are not employees of the firm. Under contracts such as the one before us, publishing firms print, advertise and distribute books at their own expense. In return for performing these tasks and for bearing the risk of a book's failure to sell, the author gives a publisher exclusive rights to the book with certain reservations not important here. Such contracts provide for royalties on sales to the author, often on an escalating basis, *i.e.*, higher royalties at higher levels of sales.

While publishers and authors have generally similar goals, differences in perspective and resulting perceptions are inevitable. An author usually has a bigger stake in the success or

failure of a book than a publisher who may regard it as one among many publications, some of which may lose money. The author, whose eggs are in one basket, thus has a calculus of risk quite different from the publisher so far as costly promotional expenditures are concerned. The publisher, of course, views the author's willingness to take large risks as a function of the fact that it is the publisher's money at peril. Moreover, the publisher will inevitably regard his or her judgment as to marketing conditions as greatly superior to that of a particular author.

One means of reconciling these differing viewpoints is "up-front" money—$6,500 in Zilg's case—which provides a token of the publisher's seriousness about the book. Were such sums not bargained for, acquisition of publishing rights would be virtually costless and firms would acquire those rights without regard to whether or not they had truly decided to publish the work.

However, up-front money alone cannot fully reconcile the conflicting interests of the parties. Uncertainty surrounds the publication of most books and publishers must be cautious about the size of up-front payments since they increase the already considerable economic risks they take by printing and promoting books at their own expense. Negotiating such matters as the number of volumes to be printed and the level of advertising efforts might be possible but such bargaining in the case of each author and each book would be enormously costly. There is never a guarantee of ultimate agreement, and if a set of negotiations fails over these issues, the bargaining must begin again with another publisher. Moreover, publishers must also be wary of undertaking obligations to print a certain number of volumes or to spend fixed sums on promotion. They will strongly prefer to have flexibility in reacting to actual marketing conditions according to their own experience.

The contract between Zilg and P-H was a printed form with formal and negotiated matters—*e.g.*, the parties' names and the amount of the advance to the author—typed in. Under the terms of the printed form, once P-H accepted the manuscript it was obliged to publish the book but had discretion to determine the number of volumes to be printed and the level of advertising expenditures. These clauses are, of course, interrelated and the extent to which the language regarding promotional efforts and the promise to publish modify each other is the central issue before us. In resolving it, we must attempt to preserve the major interests of both parties. *Sharon Steel Corp.* v. *Chase Manhattan Bank*, 691 F.2d 1039 (2d Cir. 1982).

[5] Once P-H had accepted the book, it obtained the exclusive right to publish it. Were the clause empowering the publisher to determine promotional expenses read literally, the contract would allow a publisher to refuse to print or distribute any copies of a book while having exclusive rights to it. In effect, authors would be guaranteed nothing but whatever up-front money had been negotiated, and the promise to publish would be meaningless. We think the promise to publish must be given some content and that it implies a good faith effort to promote the book including a first printing and advertising budget adequate to give the book a reasonable chance of achieving market success in light of the subject matter and likely audience. *See Contemporary Mission, Inc.* v. *Famous Music Corp.*; *cf. Van Valkenburgh Nooger & Neville, Inc.* v. *Hayden Publishing Co.*, 30 N.Y.2d 34, 281 N.E.2d 142, 330 N.Y.S.2d 329 (1972) (publication of competing works may be so foreseeably harmful to author's royalties as to breach covenant to promote the book).

However, the clause empowering the publisher to decide in its discretion upon the number of volumes printed and the

level of promotional expenditures must also be given some content. If a trier of fact is free to determine whether such decisions are sound or valid, the publisher's ability to rely upon its own experience and judgment in marketing books will be seriously hampered. We believe that once the obligation to undertake reasonable initial promotional activities has been fulfilled, the contractual language dictates that a business decision by the publisher to limit the size of a printing or advertising budget is not subject to second guessing by a trier of fact as to whether it is sound or valid.

The line we draw reconciles the legitimate conflicting interests of publisher and author as reflected in the contractual language, for it compels the publisher to make a good faith effort to promote the book initially whether or not it has had second thoughts while relying upon the profit motive thereafter to create the incentive for more elaborate promotional efforts. Once the initial obligation is fulfilled, all that is required is a good faith business judgment. This is not an interpretation harmful to authors. Were courts to impose rigorous requirements as to promotional efforts, publishers would of necessity undertake to publish fewer books with unpredictable futures.

Given the line we draw, a breach of contract might be proven by Zilg in two ways. First, he might demonstrate that the initial printing and promotional efforts were so inadequate as not to give the book a reasonable chance to catch on with the reading public. Second, he might show that even greater printing and promotional efforts were not undertaken for reasons other than a good faith business judgment. Because he has shown neither, we reverse the judgment in his favor.

[6] As to P-H's initial obligation, Zilg has not shown that P-H's efforts on behalf of his book did not give it a reasonable chance to catch on with the reading public. It printed or reprinted 13,000 volumes (3,000 over the volume of sales at

which the highest royalty was triggered), authorized an advertising budget of $5,500 (1974 purchasing power), distributed over 600 copies to reviewers, purchased ads in papers such as the *New York Times* and *Wall Street Journal*, and made reasonable efforts to sell the paperback rights. The documentary record shows that Grenquist took a continued interest in marketing the book, made suggestions as to promoting it effectively and ordered that "rave reviews" be sent to BOMC as late as January, 1975.

The fact that initial decisions as to promotional efforts were trimmed is of no relevance absent evidence that the actual efforts made were so inadequate that the book did not have a reasonable chance to catch on with the reading public. The record is barren of such evidence. P-H's estimates of first year sales made at the peak of the book's standing within the firm were only 12,000—15,000. By May, before the BOMC reversal, the low estimate was 10,000. It can hardly be contended that an initial printing of 10,000 and reprinting of 3,000 is so low that it breaches the obligation to give the book a reasonable chance to sell. Plaintiff's expert, Decker, himself testified that these efforts were "perfectly adequate," although they were "routine" and P-H "did not follow through as they might have."

Judge Brieant found only that an "unexplained" reduction in the first printing and advertising budget caused the book to go out of stock for a brief period of time and prevented the exploitation of growing sales momentum. He thus did not find that P-H's promotional efforts gave the book no reasonble chance to sell. Rather, he found that sales momentum was generated but not adequately exploited because the book was briefly out of stock. That situation, however, was not an inevitable outcome of the size of the first printing since a timely reprinting would have prevented it. Indeed, Grenquist

ordered a reprinting when over 10% of the original volumes were still in stock and a delivery delay in that reprinting led to the three week out of stock situation. Moreover, the book was always available from wholesalers although, as Judge Brieant found, book sellers prefer to buy from publishers who provide a discount.

[7,8] The district court read the contract as imposing on P-H a continuing obligation to use "its best efforts . . . to promote the Book fully and fairly" and as empowering a trier of fact to second guess a publisher's judgments as to the soundness of the decisions made. We disagree. So long as the initial promotional efforts are adequate under the test we outline above, a publisher's printing and advertising decisions do not breach a contract such as that before us unless the plaintiff proves that the motivation underlying those decisions was not a good faith business judgment. Zilg failed to produce such evidence. His case was based on the theory that economic coercion by the DuPont Company caused P-H to reduce its promotional efforts. Judge Brieant found against him on this issue and, for reasons stated above, we affirm this determination.

This district court's finding that the reduction of promotional efforts was not based on a sound or valid business reason thus does not support the conclusion that the contract was breached. This district court took a different view of the legal obligations imposed by the contract and its conclusion was based on its highly optimistic opinion of the marketability of Zilg's book. Even at the peak of the book's standing within P-H, at a time when the Fortune Book Club was going to offer it as a selection and before the problems of tone and accuracy had come into focus, no one at P-H save Cavin thought the book would be as successful as the district court later found. P-H's March, 1974, estimate for five years sales, for example, was 15,000 to 20,000, the low estimate being closer to actual sales than the high estimate is to Judge Brieant's finding.

Indeed, Judge Brieant's view of the book's potential is entirely inconsistent with Decker's definition of privishing—not throwing "good money after bad"—for he in essence found that P-H had managed to avoid a small bonanza by breaching its contract.

As explained above, we think the contract between P-H and Zilg left the decisions in question to the business judgment of the publisher, the author's protection being in the publisher's experience, judgment and quest for profits. P-H's promotional efforts were, in Decker's words, "adequate," notwithstanding the reduction of the first printing and the initial advertising budget. Indeed, those reductions, coming on the heels of BOMC's decision not to distribute the book, appear to be a rational reaction to that news. Decker himself testified that the Fortune Book Club selection was an important barometer of marketability since it was an independent judgment that the book had an audience. Zilg's contract with P-H did not compel the publisher to ignore the implications of BOMC's change of heart.

Affirmed in part, reversed in part.

WATERMAN, Circuit Judge (concurring):

I concur in the result reached by Judge Winter and in most of that opinion. However, as to that portion of the opinion written by Judge Winter to which Judge Pierce has written a concurring opinion I concur in the concurring opinion of Judge Pierce.

PIERCE, Circuit Judge (concurring):

I am in agreement with the result reached in Judge Winter's able opinion. Thus, I respectfully concur, but I reach the same conclusions on narrower grounds.

[9] My concurrence is directed to that portion of the opinion addressing Zilg's claim of tortious interference by DuPont. Recognizing that applicable law requires a showing of "intentional and improper" interference with a contract before tort liability may be visited upon a defendant, Restatement (Second) of Torts § 766 (1977), I consider the pivotal facts in this case to be the district court's findings—fully supported by the record evidence—that, in effect, DuPont's communications to BOMC concerning alleged inaccuracies in the book were made in good faith and were non-coercive. *See* Opinion of Judge Brieant at 48-49, 53. In my view, these findings are a "chief factor" in determining whether DuPont's actions were improper. *See Guard-Life Corp.* v. *S. Parker Hardware Mfg.*, 50 N.Y.2d 183, 190, 406 N.E.2d 445, 448, 428 N.Y.S.2d 628, 632; *see also* Restatement (Second) of Torts § 767(a).

As to the analysis of Restatement (Second) of Torts § 767(e) (interests of society), I believe it suffices to say that because DuPont's communications to BOMC constituted a good faith, non-coercive pursuit of its interest in protecting its name, DuPont's conduct was not socially undesirable. Since we find no error as to the pivotal factual findings on this point, measured by the factor enunciated in Restatement § 767(e), those findings clearly weigh in DuPont's favor on the question of tort liability herein.

[10] Because DuPont's conduct in this case was found to be undertaken in good faith and was non-coercive, I conclude that DuPont committed no tort by communicating to BOMC its concerns about the accuracy of the book. Moreover, the determination of no contractual breach *alone* would suggest DuPont's non-liability for tort, since under New York law, breach of the contract allegedly interfered with is an essential element of the tort claimed herein. *See Jack L. Inselman & Co.* v. *FNB Financial Co.*, 41 N.Y.2d 1078, 1080, 364 N.E.2d 1119, 1120, 396 N.Y.S.2d 347, 349 (1977).

I concur in the result reached by Judge Winter.

Appendix B.

United States Court of Appeals Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the seventeenth day of October, one thousand nine hundred and eighty-three.

GERARD COLBY ZILG,
Plaintiff-Appellee-Cross-Appellant,
v.
PRENTICE-HALL INC., No. 82-7335, 82-7425
Defendant-Appellant,
and
E. I. DuPONT de NEMOURS & CO., INC.,
Defendant-Cross-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee-cross-appellant, Gerard Colby Zilg,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service* and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by Francis X. Gindhart,
Chief Deputy Clerk

*Judge Oakes disqualified himself from this case.

Appendix C.

United States District Court
Southern District of New York

GERARD COLBY ZILG,

Plaintiff,

—against—

PRENTICE-HALL, INC. and E. I. du PONT de NEMOURS & COMPANY, INC.

Defendants.

78 Civ. 0130-CLB

FINDINGS AND CONCLUSIONS AND ORDER

Brieant, J.

This diversity action, regulated by New York law, was filed January 11, 1978. It was tried before me without a jury from September 21 to October 1, 1981. Post-trial submissions have been received and considered.

Plaintiff, Gerard Colby Zilg (hereinafter "Mr. Zilg" or "the Author") is a citizen and resident of New York and the Author of a book entitled "Du Pont: Behind the Nylon Curtain" (the "Book"). The Book was published by the Trade Book Division of defendant Prentice-Hall, Inc. (hereinafter "P-H"). P-H is a Delaware corporation having its principal office in New Jersey. Defendant E. I. du Pont de Nemours & Company, Inc. (hereinafter "Du Pont" or the "Du Pont Company") is a Delaware corporation having its principal office in that state.[1]

[1] Reference except when quoting, to "du Pont" with a small "d" will be deemed to refer to individual members of the du Pont family or the family collectively. References to Du Pont with a capital "D" means the Du Pont Company.

The complaint against P-H is founded upon breach of contract, an agreement in writing (Ex. 18) (hereinafter "the Agreement"), pursuant to which P-H agreed to and did publish the Book. The complaint against Du Pont is based upon alleged tortious interference with contract. Allegations in a third claim pleaded, founded upon claimed antitrust violations, were withdrawn under the provisions of the pre-trial order docketed September 21, 1981, ¶ 2.

Familiarity with the stipulated facts in the pre-trial order in this action is assumed, and those facts will be repeated only to the extent necessary to permit an understanding of the matter.

Mr. Zilg is a journalist and author, of left-wing persuasion, whose age was 29 in 1974 when this Book, his first, was published by P-H. Raised in New York City, he attended one year of college at St. John's University, following which he dropped out to work as a sheet metal worker and at various other similar jobs. Returning to college at State University of New York at Oneonta, he received a degree of Bachelor of Science in 1970, majoring in political science.

In May 1968, Mr. Zilg became employed on the staff of the Hon. John Dow, a New York Congressman from a suburban and rural upstate district [not from Delaware, as the New York Times incorrectly stated in its review of the Book (Ex. 273)]. While attending college, Zilg had served as a presidential campaign organizer in upstate New York for Senator Eugene McCarthy, and also for a brief period for Senator Robert F. Kennedy. While campaigning for Senator Kennedy he met Congressman Dow. This led to his employment in Washington, D.C. and New York with the Congressman.

Following his service with the Congressman, Mr. Zilg taught public school in Delaware, where he performed extensive research, in part in libraries endowed or maintained by the du Pont family, and in part in public research facilities. It was during Dow's campaign that Zilg says he first became interested

in the history of Du Pont. During a prior term Congressman Dow had been one of a few who opposed the "Gulf of Tonkin" resolution which President Johnson later interpreted as authorizing the Vietnam War. To provide some factual support for his position against the Vietnam War, he had assigned members of his campaign staff to perform historical research on the subject of war profiteering. During this research Zilg came across information concerning Du Pont, which, although public, he believed had never been published before in any book. This experience inspired the Book.

Plaintiff began work on the Book at least by 1970 and retained a New York literary agent, Mr. Oscar Collier, who testified at trial. The Book was sold initially to the David McKay Company by contract dated January 6, 1971 (Ex. 7). At that time very little, if any, of the manuscript in its final form had been written.

As a result of mutual dissatisfaction, Zilg cancelled the McKay contract, and the Book was offered through Collier to the Trade Book Division of P-H. In early 1972 Collier arranged for Zilg to meet his friend of long standing, Bram Cavin ("Cavin"), a Senior Editor at the Trade Book Division of P-H. Collier presented Zilg's idea for an "expose" Book about Du Pont to Cavin, making no disclosure of the prior relationship with McKay. However, such disclosure apparently was not required under the custom of literary agents.

Cavin had lunch with Zilg. He found Zilg to be a kindred soul, with views essentially similar of matters historical and political, as his own. With Zilg's help, Cavin prepared a written proposal on P-H's Trade Division "Book Proposal" form (Ex. 17), dated June 15, 1972 (the "Book Proposal"). The purpose of such form was to obtain internal clearance or approval at P-H to issue a contract to an author for a manuscript to be written (Tr. 16, 18).

Cavin's Book Proposal presented the proposed Book as follows:

> "This is going to be a thoroughly documented study of the major role the DuPont family has played in the development of modern America and its corporate and social institutions. After skimming lightly over the family's origins in France and its development of its gunpowder business up to and through the Civil War, the book will concentrate on the period after that conflict right down to the present day. The story — essentially one of money and power — is going to be told in human terms and in the lives of the members of the family and their actions. The family will be looked upon as a unit in its relations to the outside world. But it will also be shown to be, as many families frequently are, one torn by feuds and struggles over the money and the power." (Ex. 17).

The Book Proposal represented the effort as being "a popular book," which "will be bought by the great number of people who want the inside story of the DuPonts."

John Kirk, who was then Editor-in-Chief at P-H approved the Proposal. These events occurred prior to the arrival of Peter Grenquist on the scene at P-H. Mr. Grenquist's subsequent participation in the matter is referred to in some detail below. Grenquist became President of the Trade Book Division of P-H in late 1972, as a result of a transfer from the Audio-Visual Development Department, preceded by work in the college textbook and paperback areas of P-H's business.

The Book Proposal, as it passed through the corporate chain of command, received a notation by Gene Perme, Publicity Director of P-H, under date of June 21, 1972, who noted that the potential for radio/T.V. coverage with the Author was

"slight to non-existent unless matter in book is highly controversial and print [media] says so first." Approval on June 23, 1972 by Mr. Kirk, indicated on Ex. 17, authorized execution by P-H of the Agreement sued on here.

Thereafter, P-H made the advance payment to Zilg required therein, and Zilg continued to write the manuscript for the Book, which at that time consisted of approximately 82,000 words in draft. The first half of the final manuscript was submitted to P-H on November 15, 1972 by Collier, and the remainder was submitted in November, 1973 (Tr. 355-56; Ex. 46).

The Agreement provided that the manuscript was required to be acceptable to the publisher both as to form and content.[2] Cavin authorized such acceptance on behalf of P-H, apparently without Grenquist's participation. Payment of the prepublication balance due to Mr. Zilg under the Agreement was made in late 1973.

By memorandum dated December 11, 1973 Cavin passed along the final manuscript to Wayne Carson in the Legal Division to be examined for possible libel. Cavin advised Carson:

> "This is a terribly long manuscript, and a most important one. I don't have to tell you how much money Dupont has. I think it requires a very careful legal reading. My author has documented just about everything, and I have great confidence in him. But I still want you to read it carefully." (Ex. 49).

Whether there was anything in the manuscript as it then stood which was "actionable", *i.e.*, defamatory at the instance of

[2] No copy of the final manuscript was available at trial. All copies are said to have been lost or destroyed. However, there is secondary evidence of portions of the contents of the manuscript, through various exhibits which quote directly from or refer to the manuscript and/or page proofs. The Book, as it was finally published and sold to the public, is Exhibit 528.

the Du Pont Company itself, or any individual du Pont family member or other person named therein, is a matter of some interest and concern. We consider this point in detail later, see *infra*, pp. 36a-52a, 71a-73a.

Suffice it to say now that on February 27, 1974 P-H's in-house legal counsel responded to editor Cavin, relying on *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (decided June 7, 1971) to the effect that:

> "I am of the opinion that the book will fall under the constitutional protection as exemplified by *Rosenbloom vs. Metromedia*. That case holds that if the individual allegedly libeled is a public figure, or the subject matter of the book is one of 'public interest', there will be no libel unless there is actual malice or such wanton disregard for the truth that it is tantamount to actual malice.
>
> • • •
>
> For those individuals who may not be 'public figures', it is certain that the subject matter of the book is certainly one of public interest and, as such, would bring the book under the *Rosenbloom* protection. Therefore, it is my opinion that if litigation were to be started we would ultimately prevail.
>
> However, that brings me to the subject which Management must consider, that is, the nature of our potential adversary - Duponts. They are, most naturally, a very rich and powerful family and they may initiate a law suit with the intent to harass Prentice-Hall. The sums of money spent in the legal defense of this law suit could be quite substantial (remember Deitrich?) whereas the Duponts would not even notice the financial drain.

> There are two different directions Dupont thinking might take - the first is that they could be so angry that they are going to decide to come down on us with all possible weight and 'sue the hell out of us' or they may decide to let this book be ignored because they do not wish to center national attention around it and cause another 'I Am Curious - Yellow' to be born.
>
> The author appears to feel that because of certain family financial politics that none of the Duponts wish to call any attention toward themselves at this time and that a law suit would be quite unlikely. I myself have a tendency to feel that the Duponts probably will not want to call attention to themselves or the book and will let the matter go. However, I feel that Management should be aware of this possibility and should make the decision to publish, or not to, taking into consideration this risk." (Ex. 68).

This opinion was uttered by P-H's in-house legal counsel prior in time to the decision of the Supreme Court in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (June 25, 1974), the effect of which is also discussed *infra*, pp. 66a-75a

On March 3, 1974 Mr. Cavin sent Carson's report to Mr. Grenquist with Ex. 69, advising: "He emphasizes what we all know—that the Du Ponts are a very powerful bunch of people." Apparently this is the first participation of Grenquist in connection with the Book.

Those in charge at P-H determined to publish with a projected "in-stock date" of September 1974 and a publication date of mid-November 1974.

To achieve the successful and profitable publication of a trade book, several promotional activities must be undertaken

prior to the actual publication date. The P-H Subsidiary Rights Department, which is responsible for all licensing rights, attempts to obtain exposure for a book by licensing pre-publication newspaper serialization and also tries to sell licenses for simultaneous special book club editions. The publisher also seeks to achieve what are known as advance sales whereby wholesalers, jobbers and booksellers purchase and stock copies of the book being published prior to its actual publication date so that the book will be immediately available when advertising and other promotional activities begin. The publisher also seeks to generate interest in the book among book reviewers just before and at the time of publication.

In order to achieve these goals, copies of a book, or more usually, page proofs, or manuscript, in its then state of editing, are sent to numerous persons and firms. As was customary, Zilg's manuscript received this pre-publication circulation. Copies of the manuscript were sent to Mr. Al (Elwin) Silverman, Editorial Director of the Book of the Month Club, Inc. ("BOMC") as early as November 14, 1973. (Ex. 46).

At this time relationships between Zilg and P-H were harmonious. They entered into an agreement dated January 11, 1974 for the publication of a second book to be written, which Zilg entitled as "The Betrayal of Pope John: The End of the Catholic Church—The Twilight of Vatican Power." *See* Tr. 416-18; Ex. 61.

The publication of trade books at P-H begins with a document entitled "Book Production Sheet - P-H, Inc." which is Ex. 50. This form is opened at P-H when a work is acquired, and contains all of the necessary information, including history of management decisions, to permit publication of the book. It is a continuing record which follows the work for its publication life.

When the editor of a book determines that the manuscript has completed substantive editing, and is ready to go through the steps that lead from the manuscript into the manufacture of a finished book, a "Pre-Launch Meeting" is held to discuss production plans. At this meeting various P-H department representatives and senior executives are generally present along with the book's editor, and further entries are made on the Book Production Sheet. The Book Production Sheet is a printed four page form with questions to be answered and data to be recorded.

On March 28, 1974, the Pre-Launch Meeting for Zilg's Book was held. Present among others were Bram Cavin, Editor; Peter Grenquist, President; John Nelson, Director of Subsidiary Rights; Nicholas D'Incecco, Marketing Director; Norman Gold, Director of Advertising; John Kirk, Editor-in-Chief of the Trade Book Division; and Patty Neger, Publicity Director.

An entry on this form, confirmed by testimony at trial, shows that at this March 28, 1974 meeting, the committee made estimates for sales targets for the hard cover edition. The committee estimates for first year hard cover trade sales were from 12-15 thousand copies. On the same date Bram Cavin, the editor who had recommended purchase of the Book by P-H, and who participated in the committee discussion, made his own predictions of 20-25 thousand such copies during the first year of sales. (Ex. 50).

The Committee also made an estimate for sales during the next two to five years, ranging from 3-5 thousand copies. This led to a total sales estimate for a five year period of from 15-20 thousand copies. Cavin's estimates also exceeded that of the committee on the two to five year level. He estimates 5-10 thousand copies, with a total sale of the Book from 25-35 thou-

sand copies.[3] The selling price was fixed by the committee at $12.95 and a first printing order of 15,000 copies was decided upon. (Ex. 50).

Later, in May 1974, a "Pre-Launch Marketing Meeting" was held at P-H for the Book, attended generally by the same participants. At that meeting sales estimates, copy editing and further production details were discussed and a "Pre-Launch Marketing Plan" was completed. (Ex. 56; Tr. 40). Further entries were made on Ex. 50 as a result of that meeting. The participants reiterated their sales estimates, ranging from 25,000 copies by Cavin, down to 10,000 by D'Incecco and Neger. Pre-publication, or "advance" sales were estimated at 7,500 copies.

Although P-H witnesses attempted to walk away from it with characterizations such as "tentative" and "just an idea of what he [Mr. D'Incecco, the Marketing Director at P-H] had on his mind" (Tr. 857), I find that in May of 1974, P-H management had adopted an advertising budget for this Book in the amount of $15,000. *See* Exs. 87, 106; Tr. 53, 1024-25, 1275-77. This was no mere internal conclusion on the part of one or two executives, rather it was sufficiently formal so that Gold, the Advertising Director, conferred with an outside advertising agency on or about May 23, 1974. As a result of this conference, the advertising agency submitted to P-H a proposed newspaper and book review advertising budget keyed to an advance sale of 7,500 copies and designed to consume $11,171.60 of the $15,000. (Ex. 87). Apparently, the remaining portion of the $15,000 budget would have been used for catalog advertising, promotional activities, cooperative advertising and similar purposes. (Tr. 1017).

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[3] On Exhibit 50 there is a later entry of 5,000 copies for BOMC in a different ink and handwriting, placed at a different time than the Committee entry.

On July 3, 1974, the same advertising agency submitted a revised budget for $11,859.60 of the $15,000. (Ex. 106). The difference between this and the May 23rd budget was primarily the result of advertising space rate increases.

Of course, the $15,000 figure was "tentative" in that it remained subject to adjustment depending upon the success of the Book. If the Book's advance sales fell significantly short of the estimate of 7,500 copies or if the reviewers had panned the Book, the advertising budget would have been revised downward. If the advance sales were greater than the estimate of 7,500 copies, or if the reviews were very favorable, then the budget would have been increased.

I find that based upon the print order and the projected advance sales, P-H intended at all times prior to September 9, 1974 (when Grenquist cut the print order) to proceed with a $15,000 allocation for advertising. *See* Exs. 50, 190-91; Tr. 1107-09. As it turned out, the advance sales were almost equal to those projected and some early reviews of the Book, including the crucial *New York Times* Book Review, could be characterized as favorable.[4] *E.g.* Exs. 210, 228, 237, 248, 252, 255, 265, 273, 279, 280, 286, 287, 289, 320, 325.

As we shall see below, at some time between September 9, 1974 and December 19, 1974, P-H cut the advertising budget for this Book to $5,500. (Ex. 282).

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[4] The *New York Times* Book Review section of December 15, 1974 (Ex. 273) gave the Book a generally favorable review, featuring at the beginning Zilg's conclusion or inference (reported as fact) concerning entry of the du Pont family into American history. *See* text infra, pp. 14-16. The reviewer stated that the author had "pulled off a miracle" in putting together a "comprehensive, cohesive, balanced, vibrant, gossipy biography of a family one Secretary of War described as a 'species of outlaws' in a single volume." He complimented the author on his ability to "keep all the Pierres, Lammots and Irenees straight, and not let the relationship of the sprawling tribe be reduced to something as boring as a biblical begetting." The reviewer did note that the author sounded occasionally as if he were "suckled on pulp magazines."

The Activities of Du Pont - I

Among the recipients of the many copies of the manuscript sent out by P-H in the regular course of its customary efforts seeking to generate advance sales and publicity was a bookseller in Delaware. This copy found its way into the hands of a member of the du Pont family and thereby reached the Public Affairs Department of the Du Pont Company, about June 12, 1974. Much is made of the clandestine fashion in which representatives of the Du Pont Company and du Pont family members obtained access to the unpublished manuscript. The Court finds no significance in this. There is no secret in this world where two people know it. At the time when the manuscript found its way into the possession of Du Pont, a large number of copies of the manuscript were floating around in the book-selling industry, and among those acting for book clubs or users of secondary rights and possible reviewers. The Book was the subject of a substantial and intentional pre-publication sales effort, seeking to generate advance sales to wholesalers and retailers, as well as sales to book clubs and newspapers. Responsible officials at P-H expected, reasonably, that there would be greater interest in the book in the Wilmington, Delaware area. Accordingly, pre-publication efforts were greater there. P-H's action in releasing the manuscripts were reasonable and normal in the industry. It was certainly foreseeable that the manuscript would come to the attention of Du Pont, and indeed there was no effort made to prevent it; nor could there be. Du Pont already knew that Zilg was working on a book about the family and/or the Company because he had requested interviews of family members and permission to quote from a book for which the Du Pont Company held the copyright. Exs. 34-45. It was not, however, until the manuscript was read that the family or the

Company discovered Zilg had portrayed them in what may arguably be called a false light.

On reading the manuscript du Pont family members and Du Pont Company officials were outraged, and not without reason.

The Book, its Content, Quality and Character

This Court is not established as nor inclined to beccome, a literary critic. It would be impossible, however, to place in context what occurred at the Du Pont Company with respect to the Book, without focusing on certain aspects of the Book itself, and pinpointing particular statements or contentions in the Book which were perceived by Du Pont and members of the du Pont family as unfair, defamatory or misleading. Consideration of these matters is also essential in order to place in context what occurred at BOMC (*infra*, pp. 57a-66a), and to make appropriate findings with respect to the Author's breach of contract claim against P-H and his damages.

The Book began life as an intended "expose." According to Zilg, a modern aeneid began on Sunday, January 1, 1800, when Pierre Samuel DuPont de Nemours, (born 1739) and twelve other du Ponts arrived *fato profugus* at Newport, Rhode Island. During a hazardous voyage of 93 days from France, supplies were exhausted, and the crew had threatened the lives of the passengers.

> "Landing amid the harsh New England winter, Pere Du Pont led his shivering clan to the first lit house they saw. The elder Du Pont rapped heavily on its door, but failed to summon any answer. Instead, through the windows teased a full dinner neatly laid out on a table awaiting the return of the family that had gone to their

worship, as was the custom of churchgoers of that time. While the American family unsuspectingly folded their fingers in humble worship of their God of Wrath, the Du Pont family broke into their home and ate their entire meal. [Footnote omitted]. A new age arrived on that first day of the nineteenth century. The Du Ponts had entered American history--in their own peculiar way." (Ex. 528 [the Book] at 9).

According to the du Pont family tradition, reported in other Du Pont books, the starving emigres ate the householder's dinner, and concluded, as their honor required, by leaving a gold coin for the benefit of their absent unintentional hosts.[5] Zilg, by omitting any reference to payment, passes this cherished family tradition off as a mere burglary.

From then on the account of the du Ponts in America is all downhill. Every possible inference adverse to the character of the du Ponts is drawn by the Author. Wherever possible the du Pont family and its descendants are subject to group guilt.

Zilg's Book, which is rife with footnotes and citations, supports his above-quoted description of this incident of the theft of food by a footnote which cites two sources. One source is Dutton's book, which clearly mentions that a gold coin was left, the other source was a book which was not an exhibit at trial, but which was written by a du Pont family member and

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[5] William S. Dutton, *Du Pont: One Hundred and Forty Years* (Scribners 1942) at 24 (gold coin left as self-imposed fine); Marc Duke, *The Du Ponts: Portrait of a Dynasty* (Saturday Review Press/Dutton 1976) at 59 (gold coin left as self-imposed fine); John D. Gates, *The du Pont Family: An Inside Look at One of America's Most Fascinating and Private Dynasties* (Doubleday 1979) at 32 (left gold coin and note of thanks); Leonard Mosley, *Blood Relations: The Rise and Fall of the du Ponts of Delaware* (Athenaeum 1980) at 21 (left gold coin and note of thanks).

is therefore likely to have mentioned the gold coin. Accordingly, it does not appear that Zilg had any factual basis for leaving out the gold coin and changing the story to a burglary. Zilg's interpretation of this incident is significant in that it shows his attitude towards the du Pont family, its heritage and its traditions. There was simply no factual or historical basis whatever to tell this story in this fashion. The Book continues in a fashion characterized by Professor Gilbert Highet, who reviewed the manuscript for BOMC as "300,000 words of pure spite." (Ex. 58).

As was to be expected, the *New York Times* Book Review seized upon the episode of the Sunday dinner at Newport for its lead-off paragraph in a review generally favorable to the Book and also highly critical of "the du Ponts." The reviewer wrote:

> "When the Du Ponts arrived in America on Jan. 1, 1800, they were hungry, having made such a long voyage from France that their provisions ran out and they were at times reduced to eating soup made of boiled rats. Their first act on these shores was to enter a home without invitation and to steal food from a family that was at church. Thus the Du Ponts, observed Gerard Colby Zilg, 'had entered American history--in their own peculiar way.'" (Ex. 273).

Although the Book charges ongoing anittrust violations against the Du Pont Company, mentioned below, and goes on to revile everybody in sight, including Chairman Irving S. Shapiro, Judge Harold R. Medina of the U.S. Court of Appeals for the Second Circuit and William Calley, the greatest sense of outrage on the part of the members of the du Pont family

was probably focused on this theft of food. Irenee du Pont, Jr.,[6] a member of the Executive Committee of Du Pont Company in 1974, testified (Tr. 1324):

> "Q Was there any fact in that [New York Times Book] review that you considered particularly distasteful?
> A Yes.
> Q What was it?
> A There has been a family legend among the descendants of E. I. DuPont of which we have been very proud. And the author of the book under discussion today took it on himself to twist the story so it reflected very unfavorably on the family.
> Q You resented that?
> A I did."

Zilg describes himself as a "Revisionist" historian.[7] Even a Revisionist historian must have some basis in fact or logic for

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[6] In the caption of a photograph opposite p. 305 in the Book, Zilg describes Irenee du Pont, Jr. as "presently the most powerful *single* [sic] du Pont." (Emphasis added). Such solecisms abound.

[7] Zilg testified that since 1967 he has been a member of what he refers to as the "Revisionist" school of historians. (Tr. 341). According to Zilg, Revisionist historians believed in taking established facts and writing a "critique based on what I found and backed by facts." (Tr. 341). He said:

> "It's an approach toward American history that moves toward the socioeconomic forces that are shaping American history and those socioeconomic forces include individuals, include parties, include classes of individuals within the strata of society and . . . the interrelationship between those . . . strata is the fundamental dynamic force in history . . . including American history." (Tr. 402-03).

The witness Peter Shepherd, plaintiff's literary agent, defined a Revisionist historian as "a writer of history who states a different view of events from that which was earlier received." (Tr. 803).

his revising. The Court can perceive no such basis for Zilg's version of the alleged food stealing episode. His footnote is misleading, because it cites an authority (Dutton) which is directly contrary to the point made in the text, and a second authority (Gardner du Pont) which is probably also contrary to the text. Du Pont family historians believe that Pierre Samuel DuPont de Nemours (referred to as Pere du Pont by the Author here) was a man of honor and good conscience who left the coin voluntarily. A true historian, or a skilled editor evaluating the work of a true historian, would have realized that even assuming that du Pont Pere lacked the honor and good conscience attributed to him in this family tradition, as a practical man of business he knew better than to violate the property of his unintending hosts. A large band of foreigners on foot in Newport in 1800 would have faced certain apprehension, and received short shrift at the hands of the local population, if caught stealing. In the 18th and 19th centuries the American public had the courage to protect its property rights from felons. Justice then was swift, sure and chauvinistic. And we add, if the du Ponts on their arrival in America had entered a home and stolen the food therein, it is most unlikely that they would have turned such a shameful episode into a favorable family tradition while there were persons living who could have denied it.[8]

As the work progressed from manuscript to market, some parts were toned down and revised materially to obviate objections. Most glaring was the Author's initial treatment of Irving S. Shapiro, at that time serving as Chief Executive Officer of the Du Pont Company.

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[8] The population of Newport, Rhode Island, shown in the 1800 census was 6,739, most of whom lived at or near the harbor.

Mr. Shapiro is not a du Pont by blood or marriage. Indeed, he is generally considered to be the first non-family member to serve in that capacity. The Court will not recite the entire criticism of Shapiro by the Author, however, some mention is required. Through sloppy research, Zilg had apparently so confused Shapiro's career as to describe him as a former Assistant District Attorney in Queens County, New York, a post never held by Shapiro. (Ex. 175; Tr. 152, 200, 511-12). But then Zilg thought that Theodore Roosevelt had served as Mayor of New York.[9] Shapiro, however, had been an Assistant United States Attorney. *See* Ex. 528 (the Book) at 372-73.

As part of the Author's apparent theory of guilt by association as to Shapiro, he notes that as an employee of the OPA, Shapiro "worked alongside another young lawyer, who was to become even more prominent, much sooner, Richard Milhous Nixon." He notes that Shapiro was assistant prosecutor "in one of the most controversial trials of the time, that of eleven top leaders of the United States Communist Party on the charge of advocating the overthrow of the government." After noting that Shapiro "handled the appeal for the government and he won," the Author quotes Professor Chafee, describing

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[9] Zilg, a native New Yorker, claiming to be a historian who majored in political science, should have known that Theodore Roosevelt was never Mayor of the City of New York. It is generally recognized that the Oyster Bay branch of the Roosevelt family is Republican, as was Theodore Roosevelt, born to that branch of the family in 1858. At the approximate age of 28 in 1886, he ran unsuccessfully for Mayor of New York, placing third. In 1898, after a successful attack on San Juan Hill, he was elected Governor of New York as a Republican, becoming Vice President in 1900. Between Theodore Roosevelt's twenty-first birthday in 1879, and the election of Seth Low in 1901 (after Roosevelt had gone to Washington), there was only one Republican Mayor elected in New York City, William L. Strong. Daly, attorney at P-H, caught this error on July 8, 1974, after the Book had been set in page proof. *See* Ex. 112.

the Registration Act as "the most drastic restriction on the freedom of speech ever enacted by the United States during peace." (Ex. 528 [the Book] at 372).

Zilg states that Shapiro "never relented on these sorry days," and "now sits contentedly at the Du Pont Board of Directors, guiding its acquisitions and price dealings, charting its labor strategies, and steering the firm clear of the rocks of antitrust prosecutions." (Ex. 528 [the Book] at 373). The Author subsequently refers to Shapiro as being "of witch-hunting fame during the McCarthy era." (Ex. 528 [the Book] at 585, see also p. 371; Tr. at 202-03).

In a reference which can be regarded only as intentionally ambiguous the Author writes of Shapiro that "his story is one of success through persecution and disgrace." (Ex. 528 [the Book] at 371; see Ex. 94; Tr. at 200-02). It is not clear whether that sentence means that Shapiro was a success notwithstanding persecution and disgrace, or whether he became successful by means of persecution and disgrace of others. When asked about its meaning, Cavin, the editor, testified (Tr. 210):

> "Q [By the Court] What does that sentence mean to you? Does it mean that he achieved success by means of persecution and disgrace or that he achieved success notwithstanding persecution and disgrace?
>
> A I think he achieved success through persecution of other people and the author thinks that's disgraceful."

Zilg testified (Tr. 361):

> "Q [By the Court] . . . . We had that sentence yesterday, 'History is one of success through persecution

and disgrace.' Do you agree with Mr. Cavin's interpretation of that sentence?

A That's exactly what I meant. It was a sentence to read on and to shock, to encourage the reader to read on.

Q [By the Court] Have you studied Latin?

A No, sir."[10]

As noted, another public figure abused by Zilg was Judge Harold R. Medina, formerly a judge of this Court and now of the United States Court of Appeals for the Second Circuit. Judge Medina is not related to the du Ponts by blood or by marriage. He had no connection with the Du Pont Company at any time, and the Book does not claim otherwise. In the Book as published, Judge Medina is referred to simply as "a former corporate lawyer who had also been a professor at Columbia Law School." (Ex. 528 [the Book] at 372). However, in the original manuscript as distributed to the publishing trade and as seen by Du Pont, he was reviled with respect to a matter having nothing to do with his judicial functions. Zilg admitted at trial that this allegation about Judge Medina was unfounded.

After the manuscript had been circulated, Grenquist and the P-H Legal Department required that this totally unfounded libel be deleted. Zilg acquiesced, also admitting at that time that the accusation had no basis whatever in fact, and that he had no evidence to support the charge.

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[10] *Cf., ad astra per aspera;* motto of the State of Kansas.

Zilg's own testimony on this point was revealing (Tr. 357-58):

"Q [By the Court]: Is he [Judge Medina] a DuPont?
A No, he isn't.
Q Does he have any connection with the DuPonts?
A No, he didn't, except for a case involving Irving Shapiro.
Q You mean he was the judge in some case?
A That's right, that Irving Shapiro was prosecuting."

The totally unjustified vituperation directed at Judge Medina, who would seem completely irrelevant to any history of the Du Pont Company or the du Pont family, is equalled in the Author's reference to then Senator George Smathers of Florida. Certain members of the du Pont family, together with a majority of the electorate, had supported the election of Senator Smathers. Apparently, in the Author's view, all du Ponts thereby assumed moral responsibility for all future activities of Senator Smathers. The Author wrote (p. 503 of Book):

> "After the failure of the CIA-backed Bay of Pigs invasion, Smathers aided in getting back the citizenship of one counterrevolutionary, Frank Sturgis. Sturgis, a self-styled mercenary, joined the forces of Fidel Castro in 1958 at the behest of the Batista regime, only to defect in 1960. Years later, in 1972, Sturgis joined Bay of Pigs invaders James McCord (CIA), Eugenio Martinez, Virgilio Gonzales, and ex-CIA agent E. Howard Hunt in breaking into Democratic Party Headquarters at the behest of Nixon's Re-election Committee, in what has since become known as the Watergate affair. Smathers was helpful in other matters as well."

A member of the du Pont family served as a director of an American rubber company. Zilg claimed that the du Pont family holds a "controlling block" of 18% of the stock of this public company. This company in turn owned a 44,000 acre rubber plantation in Indonesia. In 1967 a television news show reported that "political prisoners" of the Indonesian government were working "American corporate-owned rubber fields in Sumatra and Borneo as slave labor under the guns of Suharto's soldiers." A reference in the manuscript to knowledgeable participation by this director, analogous to that of Alfred Krupp in the use of "slave labor", was watered down between the manuscript and the final book to a charge that "it is unlikely that [the director] is unaware of the source of this plantation labor." (Ex. 528 [the Book] at 411).

Zilg testified (Tr. 487-88):

"Q Did you have any basis for believing that [the director] was personally aware of this slave labor use, if in fact it occurred?

A It was my belief that the director of the corporation is aware of the practices of that corporation if the corporation has been involved in this practice for awhile. And this is over five years. And that furthermore, as I stated, I thought that that fell under the same kind of argument that was used to convict Alfred Krupp at the Nuremberg trials for using prisoners of war, also, in the munition plants as slave labor.

Q You thought by parody [sic, should read "parity"] of reasoning you thought it possible to convict the Du Ponts for the fact that [the rubber company] used slave labor in their plantations in Indonesia?

A I would hope that I would strike a chord of conscience in the Du Ponts to withdraw from such practices of [the rubber company]." (See also Tr. 510-11).

The history of the du Pont family, now having some 1,600 living lineal descendants in America[11] is told in some detail with special attention to those few descendants who remained participants in or controlled the family gunpowder business over a period of almost two centuries, expanding it into a leading chemical, plastic and paint manufacturer, and one of the top "Fortune 500" companies, which it is today. Events before World War I are judged by the Author for the most part according to late Twentieth Century morality and legal standards.[12]

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[11] At p. 560 of the Book Zilg wrote:

> "There are over 1,500 lineal descendants of that mischievous French aristocrat Pierre Samuel DuPont de Nemours. Of these only about 250 belong to the very rich, and of these only 53 belong to the central core that holds real power in the family. Within the core, the du Ponts have still a more select group, their own power elite."

On p. 2 of the Book we find the figure of 1,600 living descendants. What is a difference of 100 living du Ponts more or less to this Author, his editor, or his proofreaders?

[12] For example, Justice (then Judge) Cardozo, did not issue his landmark opinion in *Meinhard* v. *Salmon*, 249 N.Y. 458 until December 31, 1928. It was a four-three split decision of the New York Court of Appeals, with Judge Andrews writing a strong opinion for the dissenters. It was not until April 11, 1939 that *Guth* v. *Loft, Inc.*, 23 Del. Ch. 255 (Sup.Ct. Del. 1939) was decided, reversing the Chancery Court of Delaware. The opinion in that case discusses, among other authorities, the lower court decision in *Du Pont* v. *Du Pont*, 242 F. 98 (D. Del. 1917), *rev'd.* 256 F. 129 (3rd Cir. 1919), referred to in the Book at pp. 146, 160-162. In that case, the Third Circuit held:

Carl B. Kaufmann, employed at Du Pont's Public Affairs Department, prepared a three page memorandum which was

"[W]e are of the opinion, and so find, first that when Coleman Du Pont, on February 16, 1915, offered to sell to Pierre Du Pont his entire holdings in the company, of 13,899 preferred and 63,214 common stock, that neither Pierre nor the syndicate in their own then relations as officers of the company, or by reason of any prior relations of Pierre as alleged agent to negotiate for the 20,700 shares for the benefit of the company's employés, were disqualified to buy Coleman's stock; and, secondly, that in subsequently obtaining the credit and money to pay for said stock, Pierre Du Pont and his syndicate associates made no use of the credit or resources of the Powder Company, or took any illegal advantage of their several official relations to the company.

• • •

We have already found that no fraud on the part of these officers, or any of them, was established by the proofs, nor do we now find that in such election the majority stockholders made a wrongful use of their power against a helpless minority, thus creating one of the cases of corporate wrongs, where courts have unquestionably the power and undoubtedly the duty to interfere. It follows, therefore, that a reversal of the decree of dismissal in this case, and the entry of one responsive to the bill, would in substance and effect have this court hold, first, the purchase could be lawfully made by the Powder Company; and, second, that it must be made, even against the wishes of the majority of its stockholders. To us, however, it has seemed that, assuming for present purposes, but not deciding, that the company had legal power to buy, the proofs show the question of exercising its power to buy was, after all, one of those business questions of corporate policy which the stockholders, through their majority, and not a court, through its equitable power, should decide.

• • •

Viewing the case from every aspect, we see no reason to differ from the conclusion reached by the stockholders, evidenced by their vote at the master's election, against the company taking the stock, and we find no error in the court enforcing that conclusion by dismissing the bill." (256 F. at 174-75, 186).

Duane Jones Company, Inc. v. *Burke*, 306 N.Y. 172 (1954) was not decided until *January 7, 1954*. This was also a four-three split decision.

Concepts concerning corporate governance with reference to fiduciary duty and the judicial development of the corporate opportunity doctrine are relatively recent events. Judged by the mores of the times in which they acted, the affairs of the du Ponts were as nothing compared to the escapades of Fisk and Drew, Jay Gould, Commodore Vanderbilt and Charles W. Morse.

circulated from that office on June 13, 1974. He based his memorandum on "one day of access to the manuscript," and "no attempt to read the whole book," which then consisted of 1,026 typed pages.[13]

Kaufmann characterized the book:

"[F]rom beginning to end, it is in the paranoid tradition of radical economic and political journalism. The general message is that people like the du Ponts ought to be curbed if not jailed, and that companies like Du Pont should similarly be constrained. The worst possible construction is placed on almost every fragment of history. The du Ponts victimized the weak and helpless, outsmarted those who were strong but not clever, and constantly indulged in speculation, greed, duplicity, covert deals, and the naked exercise of power.

When the needs of war demanded more production, productivity was improved through forced speedups. 'Pinkerton spies' were brought in to ferret out malcontents. To undercut the militants and organizers 'minor concessions' were made to the workers, one example being the introduction of disability insurance. The interest of the du Pont family in improving Delaware schools was based on the desire to retain control of society 'through a rationalized educational system it could dominate.'

The du Ponts, allegedly the richest and most inbred family anywhere, are claimed to hold effective control of well over 100 corporations, and to be willing to do anything for money:

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[13] Mr. Kaufmann's report to Du Pont, dated June 13, 1974 (Ex. 94) states that that the manuscript consisted of 1,026 pages. However, Michael George's report to BOMC dated January 16, 1974 (Ex. 64) states that the manuscript consisted of 1,076 pages. *See infra* p. 94a.

'. . . in violation of the same international accords (used) to convict Alfred Krupp for using . . . prisoners in his munitions plants, [the rubber company] uses thousands of political prisoners as slave labor on its rubber fields in Indonesia. The Du Pont most directly responsible for this policy is [the director]. . . .'

Du Pont will and does produce on military contract VX nerve gas and 'other weapons in violation of the Geneva Convention.' The company will exploit poor peasant labor in Latin America ('still suffering from the crippling polio of foreign exploitation') etc.

The cast of characters is impressive. Included are dozens of major and minor figures in the family and company who appear numerous times, plus spear-carriers who cross the stage only once — e.g., William Calley, later lieutenant, hired as a scab during a strike at Ed Ball's Florida railroad. The lush life style of the Chateau Country appears to intrigue the author. He dwells on details in describing homes and recounting such events as the du Pont-Roosevelt wedding. The manuscript is riddled with typographical and factual errors, and unprovable assertions. The copy we saw showed only scattered signs of editing, haphazardly and ineptly done.

It was indicated to us that Prentice Hall plans to publish the book, but it seems unlikely that a reputable house would touch the manuscript in this condition. Among other things, some of the allegations in it may well be actionable.

We can only guess at the effects such a book might have on the company reputation. Works like this come along from time to time and, as with the Nader report, the reaction to them is as much a reflection of the public moods of the moment as of the contents of the book.

> Right now a fair number of fence-sitters may be disposed to believe bad things about corporations and multimillionaires. From that point of view the timing is unfortunate. The fact that the book is so shrill actually works against it, though. It imputes such outrageous behavior to so many people that it is possible the only people who will believe it are those who are already 'believers.'" (Ex. 94).

Richard H. Rea, a senior attorney in the Du Pont legal department expressed his views (Ex. 96). He said that he:

> "found it to be a readable, totally distorted history of the du Ponts and the Du Pont Company. The author appears to be a political revolutionary who is fascinated by the du Pont family's wealth and lifestyle. In effect, he is calling for a social revolution by the working class against the oppression of the du Ponts. He clearly identifies by name and location many family members, and sets forth in detail their corporate holdings and other assets. It is as if he wants to plant the idea that there is an identifiable group in the United States who should be 'overthrown' because of vast greed and social injustice perpetrated over the past two centuries. The book is aimed more at the family than at the Du Pont Company, probably because social injustice is more appealing when personalized.
>
> Of concern to Du Pont are the many allegations that the family and/or Du Pont control or have controlling interests in many large U. S. corporations such as [names of corporations omitted].

Mr. Rea also considered whether the Book was "actionable" as defamatory. He wrote (Ex. 96):

> "There are many allegations of misconduct which might constitute defamation of Du Pont. One thrust of the book is to attack the reputation of Du Pont as a legitimate business concern and to impart improper motives to its actions. For example, at p. 1025, the following appears: 'By keeping prices up, the SAAMI [Sporting Arms Ammunition Mfrs. Institute] serves as a trade association similar to Gen. Henry du Pont's Powder Trust in the 19th Century'.
>
> We do not recommend any action at this time, as we will have to wait and see whether the book is published and what changes, if any, are made. At this stage, it appears to be more of a potential problem to the du Pont family than to the Company."

In its foregoing analysis the Court has pinpointed some of the more obvious defects in this work, if it were viewed as a serious work of American history, or a serious biography. At a later point we shall see how P-H described the Book as a "polemic." That it certainly is. We do not suggest, however, that the Book is totally without redeeming virtue. Tremendous time consuming research generated the information, none of which was personally known to Zilg, and very little of which was the result of personal interviews. The Book shows long hours spent in libraries. While parts appear partisan and highly inaccurate, the Book nonetheless makes interesting reading for persons interested in this sort of historical analysis, and those who enjoy inside gossip about wealthy or prominent figures. Those sharing Zilg's strident left-wing political views

would also find the Book delightful reading. It confirms their worst fears. When finally published, it excited great interest in Delaware where it was a non-fiction best seller. Those who actually believe that in 1934 the American Liberty League intended to overthrow the Government supported by such "biggies as Du Pont, U. S. Steel, Guaranty Trust, Montgomery Ward and the Rockefeller interests" would also find it "fascinating."[14]

The Activities of Du Pont - II

On June 18, 1974 (Ex. 97), Thomas W. Stephenson, Director of the Public Affairs Department at Du Pont expressed agreement with the opinion of Rea that "no action can be taken unless and until the book is published." This conclusion was circulated to high level Du Pont Company executives and leading members of the du Pont family. Apparently they concurred.

However, Ex. 115 indicates that Du Pont Company was attempting to find out about Zilg and to locate a friend or acquaintance in P-H management. To do this Du Pont consulted standard reference books, including Who's Who in America and the Standard & Poor Register. Finding no interrelationship which could provide a basis for networking, the individuals acting for Du Pont apparently rejected the idea of speaking directly to someone at P-H whom they did not know. (Exs. 103-05, 110-11, 115).

Between June 12, 1974 when the manuscript first came to the attention of the du Pont family and the Du Pont Company, and about July 25, 1974, Du Pont remained silent, except for some sporadic internal efforts to find out who Zilg was, how and where he did his research, and other background information.

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[14] Quoted from *New York Times* Book Review of December 15, 1974. (Ex. 273 at 2). The reference has to do with the activities of Gen. Smedley D. Butler, not a member of the du Pont family.

However, on July 11, 1974 (Ex. 116) Du Pont first learned from Mark Duke, another author and friend of Zilg, that "the Fortune Book Club, a subsidiary of Time, Inc. [sic], picked up the Zilg book after it was turned down by Book-of-the-Month Club, Literary Guild, and the Doubleday clubs." Duke also told Ms. Sargeant of Du Pont that he had not seen Zilg since 1971 and that David McKay, a publisher, had turned down the book, but that the rejection "may have nothing to do with literary quality. McKay is a conservative publisher and Duke says anything Zilg writes is likely to be far to the left." (Ex. 116).

Mr. Duke also informed Du Pont that although Zilg had spent less than a day at the Eleutherian Mills Historical Library, a facility endowed by the du Ponts, Zilg had "lived in the Wilmington area for a year or more and that there is plenty of source material in the area, including a special collection at the University of Delaware." (Ex. 116).

Book-of-the-Month Club

Book-of-the-Month Club is not a club. It is a profit-making entity which uses the mail order "book club" method of merchandising hard cover trade books. In 1974 the Club (hereinafter "BOMC") sold its editions of books licensed by it from the initial publisher, to its "members" on a negative option basis. Each month it sent out a newsletter to the members describing the selection for the coming month, and various alternate selections. Members were permitted to answer by mail within a specified time limit, either selecting an alternate book, or advising the Club that they would take no book that month. Those who did not write to BOMC by the cut-off date would receive the Club selection as a matter of course, and be billed for it. Usually BOMC selections were published at or about the same release or publication date used by the trade book division of the original publisher.

Because of its volume, BOMC was able to achieve production savings. Accordingly, BOMC did not buy printed books from publishers. It rented the electronic/photographic equivalent of plates, and printed and had bound its own books by its own printing and binding contractors. Such books would indicate on the title page that they were BOMC editions. Because of its manufacturing savings, and the marketing advantages of direct sale to members, BOMC could and did sell to its members at a slightly lower price than the simultaneously published trade edition of the original publisher.[15]

In addition to the Book-of-the-Month Club itself, BOMC operated several smaller specialized book clubs, appealing to readership in particular categories of specialized interest. Among these subsidiary book clubs of BOMC was the "Fortune Book Club," which appealed to a readership consisting primarily of business executives interested in business management and the history of American business. This book club had been founded initially by Fortune Magazine, and directed to Fortune Magazine subscribers. However, shortly before the incidents in this case, the management of the Fortune Book Club was delegated to BOMC by Time-Life, Inc., publishers of Fortune Magazine.

Under the traditional arrangements in the book publishing industry, the subsidiary rights department of P-H entered into an agreement with BOMC, Ex. 75, dated April 8, 1974, based upon a per copy royalty with a minimum royalty payment of $3,000.

By industry practice, and by specific agreement in this case, BOMC is fully indemnified by the licensing publisher (P-H in this case) against any claims for defamation, libel or similar

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[15] This Book was sold by P-H at a retail list price of $12.95. However, BOMC's price to its members would have been $10.95. (Tr. 320).

litigation. This includes the right to a defense at the licensor's expense by attorneys satisfactory to BOMC. While BOMC was concerned about possible lawsuits of the sort (*e.g.*, claims of plagiarism) which might lead to an injunction disrupting the distribution of its newsletters and leaving BOMC with a book which it could not sell, it was not considered part of BOMC's function to form an independent judgment as to whether any book was defamatory or actionable.

The method by which BOMC selects books is of passing interest, and relevant to the case. On November 14, 1973, John Nelson, Director of Subsidiary Rights at P-H had sent a copy of Zilg's manuscript to Mr. (Al) Elwyn Silverman the Editorial Director and Vice President of BOMC. (Ex. 46). Like most publishing businesses, the editorial side of BOMC functions separately from the financial, corporate and legal side.

Basically, Mr. Silverman supervised the selection of books for the various book clubs. He was the overall supervisor of the Fortune Book Club, but had no direct day-by-day involvement in it. That Club had its own editorial department, which would recommend books for selection. Those selections were made subject to Silverman's executive oversight.

Manuscripts, some 400 per month, are received from publishers and agents by BOMC. So-called "in-house readers" and "outside" or free-lance readers, of stature in the particular area with which the manuscript is concerned, were required to read the books and make written reports. On the basis of the reports, decisions to use the book for any particular club were made by the editorial department of that club, aided by a "Board of Judges" and subject to Mr. Silverman's approval. At that time BOMC was using at least 50 or 60 outside readers, who received fees for reading a book, and were selected for their expertise in specific areas. Customarily, the executive or non-editorial portion of BOMC management had no input in these editorial selections.

As a result of internal decision making procedures at BOMC, the Book was dropped from consideration as a selection for the main, or original general readership Book-of-the-Month Club, but was passed on to another in-house reader at BOMC to be considered for use by Fortune Book Club, at that time operated as a division of BOMC. That Club was much smaller than the main or original Club.

Book selection at BOMC and its subsidiaries was intended to judge books on taste, quality and the kind of impact the book would have on members. It was the intention of BOMC management to retain the members in the clubs, and furnish them with attractive, commercially desirable books.

Fortune Magazine, where the Fortune Book Club originated and from whose readers its members were drawn, is devoted to the interests and activities of American business, especially the most prominent large corporations, including Du Pont, called the "Fortune 500." It is an expensive publication which reports on financial and business matters of current interest, including the interrelationship between government and business, and the interrelationships between competing firms and industries, as well as new developments of interest to corporate managers, and matters concerning corporate governance. It circulates in the executive suite. The general thrust of Fortune Magazine may be described as being pro-business, and supportive of traditional American values.

The business and financial achievements of the Du Pont Company and its history have been a frequent subject of articles in Fortune Magazine. To the extent that Fortune Magazine has an editorial position, that position could be regarded as generally favorable to the Du Pont Company and its recent management. Du Pont appreciated the relationship and wanted to keep it. *See* Tr. 1446-48. The philosophy found in Zilg's Book and the inferences drawn concerning the

conduct of American business in the recent past are totally at odds with the perceptions ordinarily found in Fortune Magazine. The values and the opinions of the Author are at great variance from those of the typical subscriber to Fortune Magazine or those likely to belong to its book club.

Nevertheless, as we discuss further, *infra*, pp. 90a-95a, BOMC accepted the Book for use by Fortune Book Club.

Activities of Du Pont - III

While Du Pont was resting somewhat uneasily, awaiting publication of the Book, persuaded that no "action" could be taken until the Book was published,[16] it learned on July 11, 1974 that Fortune Book Club had selected the Book.

Acting for Du Pont Company was a middle level employee of its Public Affairs Department, Harold G. Brown, Jr., referred to occasionally in the trial record and herein as "Du Pont-Brown" or "Wilmington-Brown" to distinguish him from F. Harry Brown, the First Executive Vice President and in-house legal counsel of BOMC. The latter Brown is occasionally referred to in the trial transcript and herein as "BOMC-Brown" to distinguish him from Harold (or Harry) G. Brown, Jr.

Du Pont-Brown spoke to the managing editor of Fortune Magazine on July 25, 1974, and learned that the Fortune Book Club was now operated by BOMC. He then telephoned Ms. Vilma Bergane at BOMC, having received her name from the managing editor of Fortune Magazine.

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[16] By "action," we assume legal action is meant, *i.e.*, a lawsuit for defamation. It is hard to see what other "action" could have been taken, with the possible exception of a public denial of some of the more current slanders. In most instances, such denials only add currency to the charges, and for that reason modern corporate public relations officers seldom dignify defamation with any answer beyond "no comment," or a simple denial.

The position of Ms. Vilma Bergane at BOMC was then that of "Manager" of the Fortune Book Club, a non-editorial function having nothing to do with the selection of books. Du Pont-Brown made a contemporaneous memorandum of his telephone conversation (Ex. 134). He learned from Ms. Bergane that P-H would publish the Book, and that it would be a selection of the Fortune Book Club. Du Pont-Brown recorded in his memorandum that:

> "I told Ms. Bergane that the manuscript had been read in Wilmington by several persons, including attorneys, and that they had described it as 'scurrilous' and 'actionable.' I suggested that she might want to take a look at the manuscript."[17]

Ms. Bergane, according to Du Pont-Brown's memorandum, said that she would look at the manuscript, and would pass along the comment to the Editor-in-Chief. Brown left his telephone number and expressed a willingness to speak with BOMC's Editor-in-Chief. Ms. Bergane telephone Eileen Abrahamson of P-H at 9:15 A.M. and told her a version of Du Pont-Brown's call. (Ex. 130, 139).

There is some dispute in the trial record as to what Du Pont-Brown said and did. However, his own contemporaneous

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[17] The term "scurrilous" is defined:

> "Grossly indecent or vulgar, as befits low jesters or buffoons; characterized by vile abusiveness or vulgar jocularity or railing; opprobrious; vile: said usually of language or of one who uses it; as a *scurrilous* speaker; a *scurrilous* attack; *scurrilous* jokes; a *scurrilous* journal. Syn.: ABUSIVE." (Funk & Wagnalls *New Standard Dictionary of the English Language* (1949) at 2205).

memorandum confirms that he told Ms. Bergane that the manuscript had been described by persons, including attorneys, as scurrilous and actionable. It does not confirm any statement on his part that the Book was "in litigation." (Ex. 134).

F. Harry Brown, BOMC's First Executive Vice President and in-house legal counsel, was not an editor, and was not generally concerned with the selection of books from among the large number of proposed manuscripts submitted to the clubs. In the corporate hierarchy he was superior to Silverman and Bergane.[18]

BOMC-Brown died prior to trial. He left a contemporary memorandum which I find faithfully records the discussion which Du Pont-Brown had with BOMC-Brown on that date.[19] (Ex. 128).

> "I had a telephone conversation today with Harold Brown, Head of the Public Affairs department of the Du-Pont Company.
>
> I told him that I was not quite clear about his conversation with Vilma Bergane and asked him to repeat his comments.
>
> Mr. Brown said that the manuscript has been read in Wilmington by family members as well as lawyers. They found the book abusive, and some of the readers (Mr.

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[18] As Ms. Bergane perceived the chain of command at BOMC, if one had a legal matter to discuss, one went to Brown; if one had an editorial matter, one would go to Silverman. (Tr. 226-27).

[19] In his own memorandum (Ex. 151), Du Pont-Brown also recounts this conversation accurately, however, he states, incorrectly, that it took place on July 26, 1974. *See* Ex. 128; Tr. 1412-16.

Brown made it very clear that this did not mean 'all of them' and that he himself had not read the book) consider the book scurrilous and possibly even actionable.

He refers particularly to some remarks about their present chairman Irving Shapiro which talked about a 'conspiracy'. This is language which the Daily World (successor to the Daily Worker) used in the same context.

I asked him whether he had contacted the publisher, but he said 'no'. I said that I was somewhat surprised since we could be considered one step removed. He replied that he was aware of this, that he wanted to contact Prentice Hall and that he was not sure who was the right person there. I referred him to Peter Grenquist.

The entire conversation was extremely friendly and low keyed on the part of Mr. Brown and he made a point of the fact that the DuPont people did not intend to 'throw their weight around'."

In sharp contrast with BOMC-Brown's contemporaneous memorandum is the trial testimony of Ms. Vilma Bergane. Ms. Bergane had no involvement in the process of selecting the Book as a Fortune Book Club selection. It was not part of her duties to read reports from readers prior to the editorial meeting at which selections were made, although she did attend the meeting, probably held a week prior to April 8, 1974, at which BOMC selected the Book for the Fortune Book Club.

Following her conversation with Du Pont-Brown, Ms. Bergane testified that she did not go to Mr. Silverman, but decided to go immediately to BOMC-Brown. She left a message with BOMC-Brown to call Du Pont-Brown.

Ms. Bergane did not recall at trial having spoken with anyone at P-H on that date, although Exhibits 130 and 132 would certainly confirm that she did so. Ms. Bergane concedes that she spoke to Ms. Abrahamson at P-H at some time with respect to the Book. Ms. Abrahamson's contemporaneous record shows essentially that by the time she received the information concerning Du Pont interest in the Book, the situation had escalated.

According to Ms. Abrahamson, Ms. Bergane advised that "the Book is in litigation" and that she (Bergane) thought that P-H "should be warned of this," further that the Book is "full of untruths."

Later on the same day, July 25th, William J. Daly, P-H's Secretary and General Counsel, telephoned Du Pont-Brown. Daly died prior to trial, however, his actions are recorded in various memoranda and letters. Daly told Du Pont-Brown that he had received a call from BOMC and that BOMC had been told that litigation over the Book had been started or was about to be started. Du Pont-Brown assured Daly that he had made no such statement to BOMC. I find that he did not. Du Pont-Brown repeated his conversation with Bergane to Daly. Du Pont-Brown told Daly that he intended to call Mr. Grenquist. Daly said that he would appreciate that. (Ex. 151). At 4:00 P.M. on July 25th Daly told Grenquist of this conversation and of Du Pont-Brown's statement that Du Pont did not intend to "block publication" of the Book. (Ex. 141).

Later that same day, or early the following morning, Du Pont-Brown met with Stephenson, Manning and Rea to discuss the legal implications of Daly's call. Their consensus was that Du Pont-Brown should go ahead and call Grenquist, as Daly had requested.

At 10:45 A.M., Friday, July 26, 1974 Du Pont-Brown complied with Daly's request and telephoned Grenquist.[20] Du Pont-Brown told Grenquist that his call had not been made to Fortune Book Club in an adversary capacity, he suggested that Grenquist read the Book, assured him that du Pont family members act as individuals, and that BOMC-Brown was not called to exert economic pressure. Du Pont-Brown agreed to call BOMC-Brown and "set record straight." At 11:00 A.M. Grenquist told Daly of this conversation. (Exs. 143, 151).

Du Pont-Brown then called BOMC-Brown "who agreed that I [Du Pont-Brown] had made no comments [earlier that day] about litigation of any kind." At 11:30 A.M. Grenquist called BOMC-Brown. BOMC-Brown advised that in light of the call from Du Pont-Brown, "they [*i.e.*, BOMC] want in light of this to review the corrected . . . proofs" of the Book. BOMC-Brown also told Grenquist that "the Irving Shapiro conclusion does not speak well for the author."[21] (Exs. 144, 166). By Friday, July 26, 1974 BOMC had advised Mr. Grenquist that it was deferring release of the BOMC edition of the Book.

Under date of July 26, 1974 Mr. Daly, P-H's corporate Secretary and General Counsel, wrote to Du Pont-Brown, protesting his conduct, warning him of possible financial loss to P-H, and reminding him of their prior [telephone] understanding that he would "assure BOMC that you [Du Pont-Brown] had not stated earlier that the book is in litigation or that it will be," and "clarify any confusion in their [sic] mind as to what they understood to be a hostile stance by Du Pont in this matter." Mr. Daly's letter continues, "we trust you will

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[20] In Exhibit 151, Du Pont-Brown also stated incorrectly that this conversation took place on July 27, 1974 (which was a Saturday). *See* Ex. 143; Tr. 1228-29, 1412-16.

[21] *See supra*, pp. 40a-42a.

do so and remove the fears which presently beset BOMC." (Ex. 142).

The following day, July 27, 1974, was a Saturday. During the weekend BOMC-Brown took revised page proofs of the Book home with him to read them for the first time. That same weekend, Bram Cavin, Zilg's editor at P-H, arrived by coincidence at the neighborhood wine store in Elmsford, N.Y. at the same time that Al Silverman, Editor-in-Chief at BOMC, also arrived to replenish his own cellar.

Cavin's office memorandum, typed by him the following Monday at P-H, reads as follows:

> "He [Silverman] asked me if I knew anything about the Du Pont. I told him I was the editor of it. He said he knew very little, but this is what he said. He thought Du Pont had gone first to Time, Inc. and Fortune and threatened to stop the advertising. They informed him the Fortune Book Club was now under control of Book of the Month so they went there to do what they could do. Silverman assured me that no one at Book of the Month leaked the manuscript to Du Pont." (Ex. 147).

When Mr. Silverman testified at trial, he could not recall this allegation about stopping the advertising attributed to him at the Elmsford wine store in 1974. In any event, it was pure conjecture. In essence, Silverman inferred from the circumstances and his own opinions of the Du Pont Company that this is what Du Pont probably did. There was no factual basis for this inference.

There is no evidence whatsoever in this trial record which suggests that any such threats or attempted economic coercion were imposed upon Time-Life, Inc. or Fortune Magazine by

Du Pont Company. The most that can be derived from the Elmsford conversation and Cavin's subsequent memorandum is that Cavin (and later, Daly, see Ex. 166), apparently believed that Silverman's analysis of the situation was correct, and shared the paranoic views held by the Author, as evidenced in his Book, concerning the power of the Du Pont Company and its ability and willingness to use that power. This chance conversation at Elmsford did nothing to detract from the general state of hysteria rapidly developing at P-H about the Book.

I find that nobody from Du Pont ever informed either BOMC or P-H that litigation had started or was about to start or that the Book was in litigation. However, both Ms. Bergane and BOMC-Brown had been told by Du Pont that the Book was actionable as well as scurrilous. *See* Ex. 151.

BOMC-Brown told Du Pont-Brown by telephone on July 26th that BOMC had not *cancelled* the selection of the Zilg Book, but had postponed a decision so that it (*i.e.*, Brown) would have a chance to review the manuscript.

BOMC-Brown later said that he "spent a horrible two days reading it [the page proofs]." (Ex. 167; Tr. 1417). Having read the manuscript, BOMC-Brown then reached the opinion that the Book was unsuitable for the Fortune Book Club or its subscribers, and not the sort of spiteful work which BOMC wished to sponsor.

This was the first time that anyone in BOMC above the rank of editor or "judge" had read the Book. BOMC-Brown was in a position to and did overrule the decision of the editors and judges, Silverman, *et al.*, to use the Book as a selection for the Fortune Book Club. He later stated that he made this decision under no pressure whatsoever from Du Pont and that the decision was entirely that of BOMC. (Exs. 166, 167; Tr. 282-91, 965). At least by July 30th BOMC advised P-H that BOMC

would not distribute the Du Pont Book, but would honor its royalty advance. The decision was expressed to John Nelson of P-H by telephone call from Vilma Bergane of BOMC. Their conversation, as memorialized contemporaneously by Eileen Abrahamson, is as follows: "They feel that this is not a book which would be appreciated by their subscribers." (Ex. 150).

When Ms. Abrahamson reminded Ms. Bergane that BOMC had obtained readings of the Book before contracting, Ms. Bergane said, incorrectly, that these readings were by "outside readers" who might not realize that this Book would not appeal to BOMC subscribers. On this point Ms. Bergane was either wrong or intentionally misled P-H.

Again on July 30, 1974, at the request of Grenquist, Nelson telephoned BOMC-Brown to confirm that BOMC would not be using the Book and to find out why. (Ex. 166; Tr. 965). Nelson's contemporaneous memorandum to Grenquist describes the conversation:

> "I asked him [BOMC-Brown] if he was aware that the final corrected version of the book would be ready for his examination the week of August 12. He said, 'Yes,' but that he doubted the tone of the book could be changed. I asked if the decision had been made because it was a critique of the Du Pont's or because of specifics in the present material. He replied that they have used controversial books in the past and it was his opinion that this book was a malicious book and that he objected to the whole tone.
>
> He went on to cite specific parts of the book that were extremely objectionable to him, for example: [examples omitted]."[22] (Ex. 152).

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[22] The examples given by BOMC-Brown, apparently not intended by him to be exhaustive, were not the same points noted by Du Pont. Nelson's contemporaneous memorandum says:

BOMC-Brown's memorandum of this conversation is to the same effect. (Ex. 166).

Thereafter, P-H continued to send corrected, toned down versions of the proofs of the Book to BOMC, hoping that as the Book was being toned down or improved slightly in further revisions, BOMC might change its mind.

Mr. Grenquist attempted also to gather the wagons into a circle at P-H. By memorandum dated August 2, 1974, he informed his subordinates at P-H as follows:

> "Because some questions have been raised about the general tone and approach of the author of the DUPONT book, I recommend that we simply answer any such questions with the adjective polemical. The book is a polemic argument and no pretense is made that it is anything else." (Ex. 158).

Activities of P-H After BOMC's Rejection

On August 6, 1974, haunted by recent pronouncements of the Supreme Court affecting libel, Grenquist of P-H made a decision that although P-H would send corrected final proofs

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> "One lady is referred to as donating a million dollars to charity but receiving more than that which went into her pocket.
>
> The author described a burglary of one of the Du Pont houses and proceeded to make fun of the Du Pont's. (He [BOMC-Brown] said that his sympathies were with the people robbed and not the burglar.)
>
> Again he [BOMC-Brown] said later in the book there is a reference to one of the Du Pont's whose only pleasure in life was counting money." (Ex. 152).

When asked by John Nelson of P-H whether BOMC would "reconsider if the Book were to be significantly toned down" Brown replied that this was "not very likely, but could not be ruled out." (Ex. 166).

of the Book to BOMC-Brown, "[h]owever, consensus of discussion with Legal [Department of P-H] is that direct submission by P-H [to Du Pont Company] would be fruitless or dangerous." The reasoning was explained in Ex. 165 as follows:

> "1. If we got *no response* nothing would be proved.
> 2. *Minor corrections* would not be in their interest because, they would then in effect be acquiesing [sic].
> 3. Massive 'corrections' or objections would not be possible for us to accommodate, and our rejection could subsequently be construed as 'malicious.'" (Emphasis in original).

Obviously, legal counsel to P-H had in mind the dilemma created by a series of recent Supreme Court cases concerning the interaction between the various state laws of defamation and First Amendment rights. In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), quoted with approval in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 [decided June 25, 1974 while the events referred to in this opinion were taking place], the Supreme Court held:

> "'The Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' *Id.*, at 279-280. [Footnote 6]."
>
> "[Footnote] 6. *New York Times* and later cases explicated the meaning of the new standard. In *New York*

> *Times* the Court held that under the circumstances the newspaper's failure to check the accuracy of the advertisement against news stories in its own files did not establish reckless disregard for the truth. 376 U.S. at 287-288. In *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), the Court equated reckless disregard of the truth with subjective awareness of probable falsity: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' . . . ." *Gertz, supra* at 334-35.

As a result, it was generally believed in the publishing industry then, and probably today, that it is better *not* to contact the subject of a proposed libel to seek pre-publication verification, because it would then be easier for the subject to prove at trial that the libel was uttered with knowledge of its falsity or a reckless disregard as to whether it was true or false. Since all of the Book had been typeset and was ready for printing, further corrections or deletions would have caused expense and delay. This problem existed wholly apart from whether Zilg, having had his manuscript approved and accepted once by P-H, would acquiesce in further alterations or corrections prior to publication.[23]

Responding to the written and telephoned protests of Mr. Daly of P-H, Du Pont-Brown apparently came to New York,

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[23] Having once accepted the manuscript as it did, P-H did not have such unlimited unilateral editorial control over the substantive content of the Book that it could dilute the theme sufficiently to make the "tone" acceptable. Paragraph 7 of the Agreement (Ex. 18) provides in relevant part that the manuscript "to be delivered by the AUTHOR to the PUBLISHER shall be in typewriting and proper form for use as copy for the printer, and shall be *in such form and content as the AUTHOR and PUBLISHER are willing to have it appear in print.*" (Emphasis added).

together with Richard Rea, a Senior Attorney in Du Pont's Legal Department to meet with BOMC-Brown on August 6, 1974 (not August 8th as incorrectly stated on Ex. 166; see Ex. 167; Tr. 1368-1378, 1420). At that meeting BOMC-Brown advised Du Pont that after having read the page proofs of the Book personally over a weekend and for the first time on July 27-28, "he immediately decided there was no possibility that any organization connected with BOMC would promote the Book." BOMC-Brown told Du Pont-Brown and Rea that he was "under no pressure from Du Pont and that the decision was entirely that of BOMC," and that BOMC "had to pay $3,000 for the privilege of terminating."[24]

Thereafter, on August 13th, Rea wrote Daly in relevant part as follows (Ex. 168):

> "As I mentioned on the telephone last week, your letter of July 26, 1974 to Harold G. Brown, Jr. was referred to me for reply. I have now had an opportunity to look into the matter and find that the information you have received is inaccurate.
>
> At no time has Du Pont threatened litigation or otherwise put pressure on Book-of-the-Month Club to cancel its edition of the Zilg book. Our Harold Brown did call BOMC and asked them to be sure and review the book as a manuscript which we had obtained was scurrilous in tone

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[24] BOMC-Brown's own memorandum (Ex. 166) states that "over the weekend of July 27-28 I read the galley [proofs] and gave an unfavorable report to Ed. Fitzgerald [President of BOMC]. Thereupon on his instructions Bergane called Abrahamson [of P-H] to tell her that we decided, on the basis of inside reading (previously the Book had been read only by two outsiders) not to use the Book as a selection, that we would pay the agreed minimum royalty and that they were free to place the Book elsewhere."

and contained a number of inaccuracies. We understand Harry Brown of BOMC then read the book and decided that BOMC and its affiliated clubs should not bring out an edition. Harry Brown has confirmed to us that there never were any threats by Du Pont and that his decision was based solely on his evaluation of the book.

You indicated that you found some errors and misstatements in the manuscript and that these had been corrected. Since we have no knowledge of what the book will contain when it is actually published, we can only wait until it comes out and then decide if any action on our part is warranted. Of course, we speak only for the Du Pont Company and in no way represent individuals mentioned in the book.

Please let me know if there is anything that needs further clarification."

Plaintiff reads into Ex. 168 a continued threat of litigation. The letter is susceptible of such an interpretation. Probably any attorney writing such a letter would feel compelled, as Rea apparently did, to avoid an appearance of waiver or consent, or exceed his authority. It was certainly obvious to anybody, or should have been, that never having read the Book in its finished form, the Du Pont Company could not decide "if any action on our part is warranted" until the final book was released as revised."[15] The next to last sentence of the letter

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[15] While, as pointed out earlier, reference to "any action" probably refers to a lawsuit; action by the Du Pont Company could have included release of a fact sheet to the media pointing up inaccuracies in the Book, and a public statement by Mr. Shapiro or others in behalf of themselves and the Du Pont Company denying the allegations, rather than a resort to litigation.

quoted above was of course purely gratuitous and unnecessary. No recipient of such a letter could believe reasonably, that the Du Pont Legal Department spoke for or represented individuals mentioned in the Book, mainly but not exclusively members of the du Pont family. Its inclusion in the letter may be the mark of an unduly legalistic draftsman, or the sentence may represent a veiled threat that individual du Pont family members or other persons mentioned adversely in the Book might bring a lawsuit through counsel of their own choice; a threat joined with an intimation that the writer of the letter probably knows this is going to happen.

In any event, P-H continued to be concerned about the possibility of a libel action. It sent portions of the page proofs to two former Du Pont officials for factual review (Exs. 169, 170, 172, 173, 177, 178), and continued to make corrections and editorial changes, watering down some of the more vindictive passages.

During this period BOMC-Brown was continually bombarded by P-H with material reflecting favorably on the Book and corrected page proofs. (Exs. 152, 157, 164, 184, 186, 191). At all times prior to September 6, 1974, P-H entertained the thought that BOMC might reverse its position, if convinced that the Book had been improved by editing and that no litigation would follow. (Ex. 191).

Was the Book scurrilous? (See fn.17, *supra*). All must agree that it was, even in its final form, and certain of the statements taken out of the circulated manuscript or page proof version after the excitement began were even more so.

Was the Book defamatory? Probably we need not answer this question, which in any event cannot be resolved with any certainty on this record. It is doubtful that the Book was defamatory as to the present Du Pont Company, except in one or two passages, which charge the Company with continuing

or recent antitrust violation, a federal felony. *See, e.g.*, p. 585 of Ex. 528 (the Book). Certainly the Du Pont Company, Irving Shapiro and Judge Harold R. Medina are public figures.

We cannot try a hypothetical state libel lawsuit with the lawsuit here. Among the numerous Du Pont family members and persons remotely or directly connected with them mentioned in the Book, all in a derogatory fashion, there appear to be some who, according to Zilg, consume their days as rentiers romping around in the Delaware chateau country. These are probably private or "non-public" figures, who, if defamed or portrayed in a false light to their detriment, may still sue. *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976).

The whole issue of private versus public figure is obscured as a result of the Supreme Court decisions. *See generally*, *Reliance Insurance Co.* v. *Barron's*, 442 F.Supp. 1341, 1346 (S.D.N.Y. 1977). However, we think the Book could fairly be described as "actionable," as the word is commonly used, at least by somebody out of the many reviled therein.

The proof at trial does not show that the Du Pont Company ever planned or concluded to bring any lawsuit. Du Pont's use of the word "actionable" originated with Kaufmann and Brown and was based on Du Pont-Brown's prior work as a newspaper reporter (for the genteel *New York Sun*, which did not libel persons, with the possible exception of President Truman). The Book qualifies as "actionable" in lay terms, even if a lawsuit founded on it might be dismissed as constitutionally protected, because filed by a public figure and actual malice was not provable. As a practical matter, that members of the du Pont family, or others would sue was extremely doubtful. The likelihood of any such lawsuit was well within the ability of P-H and BOMC, acting independently, to evaluate, based on their own experience and their knowledge that suing for libel often has untoward and unforeseen results for the

plaintiff, a truism demonstrated by the real life experience of Oscar Wilde and Alger Hiss, to name only two. As noted, BOMC was fully indemnified by P-H for any lawsuits which might arise out of its own publication of the Book.

Du Pont's Liability for Breach by BOMC

We assume, *arguendo*, that the contract between P-H and BOMC (Ex. 75), which is on its face a mere license, contains an implied obligation by BOMC (to P-H) actually to use the license, and issue the Book, although the point is by no means clear. We assume also, *arguendo*, that Zilg is aggrieved by the failure of BOMC to use the Book for which it has bought a five year license.[26] Having hurdled these two formidable obstacles, we turn to the next question. Why did BOMC elect not to distribute the Book as a Fortune Book Club selection, thereby forfeiting the $3,000 it had paid to P-H? I find and conclude that the decision by BOMC was not in any sense triggered by an threat of a lawsuit, or any "pressure" from the Du Pont Company. At no time was the position of the Du Pont Company in the matter ambiguous insofar as concerns BOMC. Du Pont-Brown had assured BOMC-Brown from the outset that Du Pont had no intent to sue; this position was confirmed in writing, and also as a result of a personal visit, all within a brief period of nine (9) business days from the initial phone call Du Pont-Brown had made to BOMC. The only reason that BOMC cancelled the Book was that BOMC-Brown spent

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[26] Our analysis assumes that Zilg, not a party to the contract between P-H and BOMC with which Du Pont allegedly interfered, was directly damaged by BOMC's rejection of the Book. *See contra, Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971); *Williamson, Picket, Gross, Inc.* v. *400 Park Ave. Co.*, 63 A.D.2d 880 (1st Dept 1978), *aff'd mem.* 47 N.Y.2d 769 (1979).

a "horrible two days," in his own words, of a weekend, reading the manuscript or page proofs, and determined that the Book was not in keeping with the standards of quality of BOMC or the general pro-business philosophy with which the Fortune Book Club and its members were identified, a conclusion with which the President of BOMC agreed.

In short, the Du Pont Company did not interfere tortiously or otherwise, with contractual relations between BOMC and P-H by threats or pressure; what it did was to embark on a course of conduct, which had the intended effect and result of bringing the poor quality and scurrilous contents of the manuscript to the attention of the higher officers at BOMC, those not engaged in the editorial part of the business. Every rational person, including Du Pont Company officials, is presumed to intend the natural and foreseeable consequences of his own acts. Those at Du Pont Company who acted in the matter knew and expected that if the officers of BOMC concerned with the business itself, rather than those concerned merely with making "editorial" selections, were made aware of the character of the Book and its contents, and if their attention could be focused on it, that they would find it unsuitable and reject it as a Fortune Book Club selection. Their expectations were fulfilled.

As a victim or target of the Book, the Du Pont Company had a legal right to bring its scurrilous nature to the attention of the editorial department's superiors at BOMC and urge them not to publish it. In an organization which processes more than 400 manuscripts each month, and publishes many book titles in a year, the operating officers and directors of BOMC could not avoid the likelihood of an occasional imprudent selection by their editorial subordinates, or selection of a book not in keeping with the image or the perceived interests of the Club or its members. Under the total fact circumstances of

this case, I find that Du Pont Company committed no tort, either against P-H or against Zilg, in its dealings with BOMC.

The conduct of Du Pont was lawful; it was expressly coupled with a disclaimer of any threats (with the possible exception of Mr. Rea's gratuitous reminder that the Legal Department of Du Pont did not represent individual du Ponts mentioned in the Book). The Du Pont Company had an independent interest in its good name, and accordingly had the right to protest the scurrilous nature of the manuscript by lawful means without incurring liability for tortious interference with contract.[27]

Although a corporation, Du Pont Company retains First Amendment protection for its own speech. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). Within this First Amendment protection Du Pont Company was entitled to state, of and concerning the Book, its own opinion that it was "scurrilous and actionable" and unfair to itself, and to other persons mentioned therein. Opinion expressed about an author's work is in the public figure-public issue area in which comment is privileged, absent known falsity of *facts* expressed along with the opinion, or reckless disregard of the truth of such facts. *See, e.g.*, *Rinaldi* v. *Holt, Rinehart & Winston*, 42 N.Y.2d 369, 380, *cert. denied* 434 U.S. 969 (1977); *El Meson Espanol* v. *NYM Corp.*, 389 F.Supp. 357 (S.D.N.Y. 1974), *aff'd.* 521 F.2d 737 (2d Cir. 1975); *Twenty-Five East 40th St. Restaurant Corp.* v. *Forbes, Inc.*, 37 A.D.2d 546 (1st Dept. 1971), *aff'd*, 30 N.Y.2d 595 (1972).

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[27] In *El Meson Espanol* v. *NYM Corporation*, 521 F.2d 737, 739 (2d Cir. 1975) applying New York law, the Court held that "[w]hile a corporation enjoys the same right to plead general damages as do individuals [citation omitted], since it has no character to be affected by a libel it can only be protected against false and malicious statements affecting its credit or property." Reputation, however, generally affects credit.

While Zilg had his First Amendment privilege, as defined by *New York Times Co.* v. *Sullivan, supra,* to express *opinion* of and concerning the Du Pont Company, the Du Pont Company had at least an equal and coextensive First Amendment privilege to express its opinion concerning the Book.

An analogous situation exists in a case relied upon by Du Pont; *Buckley* v. *Vidal,* 327 F.Supp. 1051 (S.D.N.Y. 1971). The fourth counterclaim pleaded by Vidal in that case was based on a letter written by Buckley, a public figure, to a publisher. Buckley asked that the publisher confer with him before publishing a manuscript submitted by Vidal, also a public figure, which Buckley felt was damaging to his reputation. Buckley's letter characterized Vidal's manuscript as "defamatory and untrue." Implicit in the letter (quoted in full at 327 F.Supp. 1052) is a suggestion that if Vidal's work were published, Buckley might sue. Buckley wrote in part as follows:

> "I have filed suit against Mr. Vidal for five hundred thousand dollars in damage. I advise you of these proceedings because I have been informed that Mr. Vidal is bent upon circulating charges about me which are absolutely untrue. I write to register my willingness to cooperate with you in any way—indeed, I earnestly request that you hear me out—so as to guard against your journal's inadvertently circulating Mr. Vidal's defamatory material."

Judge Levet's words are particularly applicable to this case. In dismissing the fourth counterclaim based on the letter, he held (at p. 1056):

> "Without making any determination as to whether or not this material rises to the level of libel, we must nonethe-

less rule that a person about whom such things are written might reasonably believe that the dissemination of such material would seriously harm his reputation.

Vidal, in response, has submitted certain documents which he claims bear out the truth of the allegations. . . . [T]he question before us is not whether Vidal's words are legally actionable. Such a finding is unnecessary. The privilege arises if the words can reasonably be considered damaging to the reputation of the party who invokes the privilege. . . . .

This brings us to the reasonableness of the response itself. Here, we find the tenor of the letter itself to be very important. The letter merely requests that the publisher to whom it was directed consult with Buckley before publishing a manuscript which he (Buckley) felt to be injurious to his reputation. There is nothing in either the content or the tone of the letter which could possibly suggest, as Vidal contends, that Buckley's intent here was one of 'poisoning and closing the available publishing markets of defendant as an author and essayist, and so ruining him economically.' . . . .

Buckley's letter was a tempered and reasoned response . . . which constituted an appropriate reaction by Buckley to a situation which seemed to threaten his reputation. Vidal has raised no fact issue which could lead a jury to find otherwise."

Utterance of an opinion about a book, such as Du Pont expressed to BOMC here, and such as Buckley expressed to a publisher in *Buckley* v. *Vidal, supra*, which would clearly be privileged when sued upon as defamation, cannot be dressed

up by pleading the same facts under a different "form of action" *e.g.*, "tortious interference with contract," and thereby state a claim upon which relief can be granted, when the same utterances and background facts did not state a defamation claim. Numerous authorities for that self-evident proposition are found. For example, in *Augustine* v. *Anti-Defamation League*, 249 N.W.2d 547 (Wisc. Sup. 1977) defendant wrote the employer criticizing a radio personality for allowing guests on a "talk show" to broadcast racial and religious slurs, without disclaiming the views so expressed as not those of the station management. The radio personality was fired by the employer. The Court held: "The right of free speech, as guaranteed by the [United States] Constitution is a privilege that has been asserted and correctly so by ADL," and that this was sufficient to bar any claim for tortious interference with contract. 249 N.W.2d at 553.

Similar cases holding that First Amendment privileges preclude actions based on defamatory words or writings which have been dressed up by a pleader to allege "contract interference" actions include *Hutchinson* v. *Proxmire*, 579 F.2d 1027, 1035, n. 15 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979); *Missouri* v. *National Organization for Women, Inc.*, 620 F.2d 1301, 1316-19 (8th Cir. 1980), *cert. denied* 449 U.S. 842 (1981); *First National Bank of Omaha* v. *Marquette National Bank*, 482 F.Supp. 514, 524-25 (D. Minn. 1979), *aff'd.* 636 F.2d 195 (8th Cir. 1980); *Sierra Club* v. *Butz*, 349 F.Supp. 934 (N.D. Cal. 1972).

I conclude that Du Pont Company had the right, protected by the Constitution, to give its good faith opinion that the Book was scurrilous and actionable. Du Pont will not thereby become legally responsible for tortious interference with contractual relations so long as the words carry, as I find that they do in the circumstances of this case, a privilege by reason of the First Amendment of the United States Constitution.

The proof at trial does not show any threat by Du Pont Company to sue BOMC or P-H. Even if it did, unless the threatened litigation were sham, the right to have recourse to the courts would also be a constitutionally protected right.[28] No cause of action lies for tortious interference with contractual relations simply because of recourse to the courts, or a good faith expression of an intention to have recourse to the courts. *Cf. Aknin* v. *Phillips*, 404 F.Supp. 1150 (S.D.N.Y. 1975), *aff'd. on opinion below*, 538 F.2d 307 (2d Cir. 1976).

I find that plaintiff has proved no claim against Du Pont arising out of its interaction with BOMC.

Du Pont's Liability for Breach by P-H

We now turn to the matter of Du Pont's claimed interference with the contractual relationship between Zilg and P-H. Here, Zilg charges in effect that Du Pont's pre-publication activity and its interchanges with BOMC and P-H, interefered with Zilg's right to the full performance by P-H of its publishing contract with him. As we discuss below, P-H did, in this Court's view, breach the implied covenant of good faith dealing and faithful performance in connection with its contract with Zilg. It did so essentially by its unjustified and unexplained sudden cut in the advertising budget and reduction in the initial press run for the hard cover book. The motives of P-H in doing so are somewhat obscure and are discussed below. In this lawsuit, as between Zilg and P-H, the motives

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[28] Our analysis indicates that persons not public figures named in the Book could have brought defamation actions which would not have been sham. Although potentially less successful, an action brought by a public figure, including Du Pont Company would not be so clearly lacking in merit as to be sham. *See, e.g., Herbert* v. *Lando*, 73 F.R.D. 387 (S.D.N.Y. 1977); *rev'd* 568 F.2d 974 (2d Cir. 1977), *rev'd.* 441 U.S. 153 (1979).

of P-H are probably not especially significant; they are relevant only as between Zilg and Du Pont.

One thing is certain, P-H denies that it "privished" the Book,[29] and denies specifically that it caved in to any threats or pressure from Du Pont Company. The trial record does not permit an inference that P-H did so, and the Court could not draw such an inference, except for the purpose of explaining what may seem inexplicable. For this reason, and since P-H denies that it breached its contract or cut the press run and advertising budget, or otherwise acted adversely to its own interest or that of Zilg because of Du Pont's interference, the Court refuses to find that this occurred.[30]

P-H first learned of Du Pont's outrage over the manuscript second hand, from Vilma Bergane of BOMC, on July 25, 1974. Apparently Du Pont would have liked to have approached P-H directly and earlier, but did not do so, in part because nobody at Du Pont was acquainted with anybody at P-H. They looked up P-H in Standard & Poors Register, then checked the names so found in Who's Who. See *supra*, p. 52a-53a and Exs. 103-05, 110, 111, 115. They found nobody listed on the P-H roster with whom they were acquainted socially or in business. While it seems unusual that Du Pont Company officials con-

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[29] "Privished" is a slang word used in the industry to denote the opposite of "published." *See* text *infra* at 89a-91a. Privishing constitutes a breach of contract. (Tr. 639).

[30] Conceivably, if P-H took the position that it had caved in because of interference by Du Pont, that might not violate the implied covenant of good faith dealing and faithful performance. The standard requires reasonable efforts; it probably does not require a promisor to throw rocks at Superman (assuming, with Zilg and Cavin, that Du Pont is Superman). The concept of "carrying the Message to Garcia" is foreign to modern contract law. *See A Message to Garcia* by Elbert Hubbard (East Aurora, N.Y. 1899) and discussion (*dicta*) in *Bloor* v. *Falstaff Brewing Corp.*, 601 F.2d 609, 612, 614 (2d Cir. 1979).

cerned about this Book would make no representations to P-H about its falsity simply because they did not know with whom they should speak, it is also true that publication to the Fortune Book Club roster of business leaders was more deleterious to Du Pont Company in the readership areas which count, than would be a general circulation of a scurrilous book to typical readers of American history who buy hard cover books in stores. Only thus can we explain why Du Pont called Fortune Magazine and then Fortune Book Club, without calling P-H or the Author, the only participants who could have toned down or corrected the Book.

Beginning on the first day, P-H stood up to Du Pont by letter and phone call and threatened litigation of its own against Du Pont. (Ex. 142). Mr. Daly of P-H gave an interview to the *New York Times*, published January 21, 1975 (Ex. 337) in which he accused BOMC of having "knuckled under to pressure" of Du Pont Company, and denied that the Book had more than "four minor factual errors" and "one or two questioned adjectives."

For failure of proof upon this trial record that P-H's breach was induced by Du Pont, and in light of the foregoing discussion, the Court finds and concludes that plaintiff is not entitled to recover damages against defendant Du Pont Company, either by reason of claimed interference with the contractual relationship between plaintiff and P-H, or between BOMC and P-H.

Defendant E.I. Du Pont de Nemours & Company is entitled to judgment in its favor, that plaintiff recover nothing against it.

Breach of Contract by P-H

Familiarity is assumed with this Court's Memorandum Decision dated June 9, 1981 upon the summary judgment mo-

tion in this case as between plaintiff and P-H. This Court adheres to its conclusions of law therein expressed, that under the Agreement (Ex. 18), which the Court finds free of ambiguity, P-H was required to exercise its discretion in good faith in planning its promotion of the Book, and in revising its plans.

This Court held then that the obligation that defendant P-H exercise its discretion in good faith could not of course obligate it to expend more than fair and reasonable efforts to promote the Book, and that P-H would not breach the contract if the relevant decisions it made were guided by any legitimate business purpose. The Court held then and continues to hold that P-H would violate its contractual duty to Zilg if it provided less than reasonable efforts to promote the Book, or if by its performance or lack thereof it breached the implied covenant of good faith and fair dealing so as to deprive plaintiff of the benefits he would otherwise have received under the Agreement.

Plaintiff's ten separate contentions or particularization of the breach by P-H are found at ¶ 7 of the Pre-Trial Order in this case, docketed September 21, 1981, familiarity with which is assumed, and are also summarized in this Court's Memorandum Decision of June 9, 1981 (but as seven items instead of ten).

We restate these claims again as follows:

1. P-H cut the first printing of the Book from 15,000 to 10,000 copies without any sound business reason.

2. P-H reduced the advertising budget from $15,000 to $5,500[31] without any sound business reason.

3. P-H failed to inform the Author that P-H had reduced the advertising budget.

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[31] P-H actually spent $6,023. on its own advertising, plus $170.50 on cooperative advertising, totaling $6,193.50. (Exs. 395-96).

4. P-H failed to sue Du Pont or BOMC.

5. P-H failed to publicize "the Du Pont effort to suppress the Book" or to cooperate with Zilg's attempts to do so.

6. P-H failed to disclose decisions affecting the Book on a timely basis to the Author.

7. P-H failed to inform the Author of, or otherwise pursue, the suggestion made by Silverman to Cavin in the wine store in Elmsford, N.Y. concerning alleged withdrawal of advertising by Du Pont from Time-Life publications.

8. P-H attempted to block serialization of the Book in Delaware and failed to make effective use of the serialization to promote advance sales.

9. P-H allowed the Book to go out of print.

10. P-H failed to inform the Author that some P-H employees in responsible positions had developed a negative attitude toward promotion of the Book, subsequent to and as a result of Du Pont's actions.

Certain of these separate contentions need not detain us. As to # 7, as we have pointed out earlier, there is no evidence that Du Pont Company ever threatened to withdraw advertising from Time-Life publications. This was at most speculation or conjecture by Silverman in an informal conversation with Cavin, which by the time Cavin had reported to his superiors at P-H, became, in the mind of Daly, an established fact. This conjecture is unproved, and since the underlying premise is unproved, the Court need not consider whether there was any duty arising therefrom as asserted in claim # 7.

Insofar as claims 3, 6 and 10 are concerned, there is no duty under the Agreement for P-H to disclose anything to the Author. Rather, the duty imposed in law on P-H is one of good faith best efforts performance, using reasonable care. Under this Court's view of the Agreement, P-H could discharge all of its contract obligations if it never spoke to the

Author again, following acceptance of his manuscript in final form. Failure to disclose or inform was not in itself a cause of any damage.

P-H had no obligation, as Zilg contends under claim # 4, to sue Du Pont or BOMC.

There is no proof in support of claim # 8. The claimed dispute about serialization was resolved so promptly that if there was a breach in connection therewith, no damage resulted. The dispute appeared to be a *bona fide* disagreement. It arose on October 24, 1974 and was resolved by the following day. (Exs. 202, 206, 209, 211). Nelson of P-H was entitled to and did have a different opinion as to serialization than Zilg had. P-H was not shown to be acting in bad faith or unreasonably on this point.

As to claim # 9, plaintiff did prove that the Book was out of print for a brief period; this resulted, of course, from cutting the first printing. (Stated as claim # 1).

As to claim # 10, that some P-H employees in responsible positions had developed a negative attitude toward the Book (and they did), when they learned of the criticism by Du Pont and the cancellation by BOMC, this had no bearing on the duty of performance by P-H. Their negativism was justified in view of the many errors and the shrill leftist tone of the manuscript and the Book. Whether they liked the Book or not, P-H having accepted the final manuscript, performance of its contractual duty to the Author was not excused by having a negative attitude. Nor does the presence of such a negative attitude exacerbate the damages, or present an additional and separate claim.

The Court finds that plaintiff did prove claims 1, 2 and 9, and these items only. Taken together, they constitute a breach of contract on the part of P-H, which caused damages to plaintiff.

The Book Production Sheet (Ex. 50) shows that before the controversy with BOMC and Du Pont arose, a first printing order of 15,000 copies was decided upon. On this form and in a later handwriting and a different color ink, an entry appears as follows: "BOM 5,000 copy order killed."

Mr. Grenquist, acting for P-H, reduced the print order to 10,000 copies. This decision was made on September 9, 1974. (Exs. 189, 190; Tr. 1108-09). On that date Grenquist informed his superior, Howard Warrington, who was President of P-H (Ex. 191) as follows:

> "On Thursday, September 5th, John Nelson sent copies with final corrections and changes to the Book-of-the-Month Club and on Friday morning, the 6th, he was informed that BOM had decided against using the book. Obviously, they did not bother examining the latest version with any care.
>
> 5,000 copies of our originally planned 15,000 copy first printing were committed to the Book-of-the-Month club. I have cut the printing back to 10,000 copies which will not price profitably according to any conceivable formula."

It was absolutely untrue that 5,000 copies of the orignally planned 15,000 copy first printing were committed to BOMC. Customarily, for economic advantage, BOMC does its own printing. The practices of BOMC in the publishing industry are well-known. Grenquist was no neophyte in publishing. *See* Tr. 1097-98.

BOMC had negotiated its book club rights to the Book with Mr. John Nelson, head of Subsidiary Rights at P-H. BOMC had a reasonable expectation, probably not communicated to

P-H, that no more than fifteen (15%) percent of its members would exercise the negative option to take the Book as a Fortune Book Club selection. Since the total club membership was at most 20,000, it was foreseeable that BOMC would sell 3,000 or less copies.[32]

The agreement between BOMC and P-H with relation to this Book, is in writing on a printed form letterhead of Book-of-the-Month Club, Inc. It is dated April 8, 1974, and addressed to John Nelson at P-H. The two page agreement confirms that BOMC received exclusive book club rights for a period of five years, except for use by P-H and its own book clubs. The standard boilerplate paragraph, clearly set out on the face page of the agreement reads in relevant part as follows:

> "*We shall manufacture* editions of this book for our requirements and we understand that you will permit us to use your letterpress text plates or a final set of offset negatives for the text, dies and jacket plates for which we agree to pay you a royalty and plate rental fee of 10% of our domestic list price for each copy of our net distribution of the book to bona fide members, i.e., members who pay for at least one club selection or alternate." (Ex. 75). (Emphasis added).

There is no question that Peter Grenquist, then President of the Trade Book Division of P-H was fully familiar with this very agreement. Apart from his general familiarity with industry practice, the proof shows that he signed it himself on

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[32] If, as some evidence in the case, including Exhibit 75 suggests the Book at most would have been an "alternate" selection, and therefore not sold on the negative option basis, then BOMC sales would have been even less. However, as an alternate selection, the $3,000 minimum royalty would seem high.

behalf of P-H, after having placed thereon an addendum containing two amendments not relevant to this lawsuit. (Ex. 75; Tr. 1105, 1175). The agreement was sent to BOMC on April 16, 1974 and returned to P-H with the addendum approved on April 22, 1974. The addendum was separately approved by Mr. Troob of BOMC. *See* p. 2 of Ex. 75.

I find that Grenquist *knew* at all times that BOMC, in accordance with its usual custom and practice, intended to do its own printing for as many copies of the Book as it needed. Grenquist knew this both through his general knowledge of the trade, and his specific knowledge of the BOMC agreement which is evidenced by the appearance of his own signature thereon. His statement that he cut the print order because 5,000 copies of P-H's first printing were originally planned for use by BOMC is simply not true; it is a fabrication. Indeed, the size of the initial press run of 15,000 copies was decided upon on March 28, 1974, *before* BOMC had agreed in April 1974 to take the Book. It is therefore clear that all 15,000 copies of the Book were intended for P-H's own Trade Book Division's retail sales.

There is nothing in the trial record to permit this Court to determine, except by conjecture, Grenquist's reason for so stating in Exhibit 191. And in this Court's view of the case, his reasons for doing so are irrelevant, unless he did so in response to interference by Du Pont Company. This Grenquist denies, and there is no basis to find that he did so for such a reason in the face of his sworn denial. *See* Tr. 1243. Also, the actions of Daly subsequent to publication are inconsistent with any inference that P-H as an entity was intimidated by Du Pont.

As already discussed, *supra* pp. 9-10, the book production committee estimated first year sales of 12-15,000 copies, including advance sales of 7,500 copies. *See* Tr. 51. Advance sales are sales made to wholesalers and retailers prior to the

publication date, but after the initial announcement. Advance sales are usually some indication of the likely success of a book, and estimates of the advance sales aid management in testing the correctness of its estimated first year sales.

In reliance in part on the first year and advance sales estimates, in May 1974, P-H adopted an advertising budget of $15,000. *See supra* at 33a-34a.

The actual advance sales were substantially in line with the advance sales estimate. This would suggest to an experienced publisher such as P-H that its predictions were right on target, and therefore its tentative plans for the exploitation of the Book should be adhered to. Nevertheless, at some time between September 9, 1974 and December 19, 1974, P-H cut the advertising budget from $15,000 to $5,500, a decrease of more than 73%.

This significant reduction in advertising took the heart out of the advance sale momentum which the Book had generated. Here again there is no satisfactory explanation for this sudden departure from previously approved advance planning, except that it occurred after the contretemps with BOMC, and after Grenquist realized that the Book was an embarrassment which should be "privished."

We disclaim any necessity to attribute a motive to P-H's activities. What was done or left undone, in an action for breach of contract, is more significant than why it was done or left undone. It must be observed, however, that this Book was signed by the Trade Book Division before Grenquist, an experienced editor and publisher in his own right, came to take charge of P-H's activities in this field.

Testimony of Cavin confirms that within the offices of P-H, Grenquist belittled the Book and made highly critical remarks about the work, its author and Cavin. Tr. 37, 156-58. Indeed Cavin attributes his firing at P-H to dissatisfaction over this

Book. Grenquist's criticisms were justified in many ways. Undoubtedly the Book was an embarrassment to Grenquist and P-H for its general poor quality, not helped much by rather poor editing and proofreading at P-H. Having contracted to publish it, and having accepted (and paid for) the final manuscript submitted by Zilg with full (constructive) notice of the numerous errors, P-H was obligated to use its best efforts and to proceed in good faith when it changed its plans. This it did not do.

Apart from its shrill and polemical approach to the du Ponts and American institutions generally, the Book is spotty in the care with which matters of history are dealt with. Some segments of the Book are very well written and show the mark of prodigious research. Examples abound, however, not all of which have been noted in this opinion, which show such poor writing, inadequate research, and faulty reasoning as to be an embarrassment to any publisher except the most doctrinaire and committed "revisionist."[33]

The experience with BOMC and the necessity to make numerous editorial corrections after the Book was set in type merely emphasized this embarrassment. *See, e.g.*, Exs. 113, 117, 119, 146, 153, 169, 172.

A short answer to all of this, however, is that P-H should have made its wishes known when the final manuscript was tendered for acceptance and approval; once having accepted it (through Cavin), P-H had the duty to perform under the Agreement. Instead, I conclude that in the words of the expert witness, William Decker, the Book was "privished" rather than properly published.

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[33] Grenquist conceded at trial that Zilg's unfair treatment of Shapiro in the manuscript created a "howler in Wilmington." (Tr. 1134-35). A "howler" is a "laughable mistake, esp. in something written or printed; a boner." Wentworth and Flexner, *Dictionary of American Slang* (2d Supp. ed., New York 1975) at 275.

Mr. Decker testified with respect to "privishing," which he suggests is a prevalent practice in the publishing industry, as follows:

"Q Mr. Decker, in the publishing industry, are you familiar with the term 'privishing?'

A Yes.

Q Would you explain what the term privishing means as you understand it in the publishing industry?

MR. SCHOEMER [Attorney for Du Pont]: Could we have it spelled, your Honor?

THE COURT: I can't understand what the word is. What's the word?

THE WITNESS: Jargon.

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THE WITNESS: P-r-i-v-i-s-h-i-n-g. It is a combination of private and publishing, to publish very private. It is a slang word we use in the trade. 'We privished it and it sank without a trace' is usually the whole sentence.

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THE COURT: I'd like to have the word defined a little better than that, if you can.

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THE COURT: What is the meaning of the expression that 'We privished the book,' referring to a specific book?

THE WITNESS: If an author came to you . . . and said he wanted to write a book about a certain subject, if that idea appealed to you and you thought you could risk the advances that this author would require, you would offer him a contract for that.

He would go home and write the book and bring it into you. You were already contracted, committed to publish and the book was all right, but the book wasn't as exciting as you had been led to believe it was going to be or it was something that you just couldn't sell.

You had to go through the motions. You had to publish it.

THE COURT: Is that really true or could you give it back to him and say, 'We don't find it acceptable'?

THE WITNESS: You could give it back to him and say, 'We don't find it acceptable,' and lose everything. He just then doesn't repay the advance. He can take the book and sell it elsewhere.

THE COURT: Without giving you back the money?

THE WITNESS: Well, if you stipulate that you want the money back, then he has to pay you out of the first monies that he gets from any other sale. But if you just — if you are stuck with the thing and go ahead and publish it and you don't mount a large compaign for it, you don't spend good money after bad, you publish it very quietly and let it go.

THE COURT: So you are talking about an intentional restraint on the degree with which the work is merchandised? When you talk about privishing a book, you are intentionally withholding efforts to make it sell?

THE WITNESS: If you don't think those efforts would result in sales, then the cooler heads say, 'Let's cut our losses and not spend good money after bad.'

THE COURT: When you reach a decision like that, do you tell the author that you think it is a lousy book and we're going to privish it?

THE WITNESS: The author has usually gotten the idea by that time by your insistence to beef it up.

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THE COURT: Well, I gather from the thrust of your testimony it is not the practice then to tell the author 'This is not such a good book and we aren't enthusiastic about it, and why don't you take it elsewhere, and if you don't we're going to privish it.' Is that what you tell the people?

THE WITNESS: Sometimes you do, your Honor, yes, sir. Sometimes you do. If they are — acrimony is beginning to build to such a point, if you tell them, if you can find anybody to buy us out on this that will do a better job on it, you are free to fly." (Tr. 607-11).

Mr. Decker gave his opinion as follows:

"Q [THE COURT]: Mr. Decker, based on the information which was brought to your attention concerning this particular book, . . . do you have an opinion as to whether or not based on that information the publisher in this case privished the book?

A Yes. It would seem to me that somewhere along the line their enthusiasm evaporated and they did not follow through as they might have." (Tr. 612).

I agree with Decker's evaluation as to what happened at P-H with regard to performance of the Agreement, and find that the failure to perform was so significant as to constitute a breach of contract.

That the Book was good at first glance, when the generally poor quality of parts of it was not readily apparent, is confirmed by the various reports prepared when it was originally considered for use by BOMC. The Book was first read by Maurice Skurnick, an outside reader for BOMC who specialized in business books. On December 6, 1973, Skurnick submitted a report which termed the Book:

> "[A] model of objective reporting on major corporations . . . . Zilg's history is fair but critical. The DuPonts are described honestly but often unflatteringly . . . . It is required reading for any student of history and, if the ordinary reader can lift it, an eye opening, dramatic picture of a part of American life that should be as well known as nylon." (Ex. 48).

Skurnick described the work as a very good book which he enjoyed reading, and which might be considered as a possible BOMC selection.

Skurnick's favorable review resulted in the Book being considered by BOMC's Board of Judges. In a report to the Board dated December 17, 1973, Clifton Fadiman found that detailed research presented in the Book to be "impressive" and described the author as "an old-fashioned crusader" who "believes the du Ponts to be basically evil people."

Fadiman went on to report that:

> "The basic trouble is that this is financial-commercial-industrial history, not human history . . . . [and it] needs a better brain than mine to follow these infinitely complex deals, negotiations, mergers; together with their connection with politics . . . . It's just too much; one can-

not follow the ramifications, unless one has a specific interest in business and the mechanisms of capitalist growth. The book is not well written, but it will certainly stand as definitive for many years.

Nonetheless, as a Selection I cannot see it; it's just too damn hard to read." (Ex. 52).

The minutes of the January 9, 1974 Board of Judges meeting at BOMC reflect that Fadiman said that the Book was an "[i]ncredible accumulation of industrial facts" but that the du Ponts were "not interesting people." We have previously noted the comment of Professor Gilbert Highet, another member who said that it was "300,000 words of pure spite." *See supra* p. 38a. (Exs. 57-58). The conclusion of BOMC's Board was that the Book was not an "A" book, a first choice, but a "B" book, or second choice. (Tr. 261; Exs. 57-58).

The consensus of the recommendations of the Board of Judges resulted in Zilg's work being dropped from consideration as a BOMC selection, but passed on to the Fortune Book Club. The Book was then read by Michael George, an inside reader for BOMC's Fortune Book Club who specialized in business oriented works. On January 16, 1974 George reported that the Book presents:

"[A] story every bit as American as the proverbial apple pie. The ingredients are all here, but Zilg doesn't know how to make use of them . . . I've not done more than taste the first 123 pages of this 1,076 page [manuscript], but if its quality is consistent (i.e., bad), it should be fed back to the author page by page . . . This is a bad book, politically crude and cheaply journalistic."

He concluded that on the whole this was a poor book which should not be considered as a Fortune Book Club selection and and he rated it a "C", the lowest rating. (Ex. 64). Somehow, it was chosen nevertheless.

Insofar as concerns claim # 5 above, to the effect that P-H refused to publicize the claimed "Du Pont effort to suppress the Book" or cooperate with the author in doing so, I find no breach by P-H. This contention may be placed in context in light of the testimony of William Decker, plaintiff's expert. On direct examination, Mr. Decker testified as follows:

> "[Q Plaintiff's Attorney]: I would like you to assume that with respect to the book, DuPont Behind The Nylon Curtain, that a representative of the DuPont Company spoke to a representative of the Book of the Month Club and spoke to a representative of Prentice-Hall and described the book as having been read by lawyers and as being scurrilous and actionable.
>
> I would like you to further assume that after receiving that phone call, Book of the Month Club canceled its selection of the book for its Fortune Book Club subsidiary.
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>
> Mr. Decker, assuming those circumstances, do you have an opinion as to what use, if any, of that should be made under the publishing standards of the industry?
>
> • • •
>
> A I think that could well be used to tremendous advantage.
>
> Q Would you explain?
>
> A Well, I would, of course, first call the lawyers and present them with this. But my inclination would be to use that as my promotion for the book. . . .

[Y]ou might have to rephrase it according to what the lawyers told you. You might have to rephrase it as a question. You might have to say 'Did DuPont try to suppress this book?' rather than this is the book that DuPont tried to suppress. Whichever way you go with it, that would be the backbone of the campaign. Knowing the nature of the book, it is a hyperbolic expose, a muckraking affair, and you need a campaign that matches it in its tenor. You wouldn't publish this book the way you publish a sensitive first novel. You've got to get up there and shout the way this book shouts. And I think that would be very useful in promoting the book." (Tr. 584-85).

On cross-examination Mr. Decker testified as follows:

"[Q Du Pont's Attorney]: Assume that you were the publisher in charge of this particular work; assuming, if you will, that a sale to the Fortune Book Club had been negotiated, but that shortly thereafter you heard that the Fortune Book Club had called up and said it was possibly going to abandon the book because it had had a call from the subject of the book. Assume further that you then got in touch with the subject of the book and said, what are you doing to us, are you trying to harass us, are you calling this an actionable book? And the subject said to you, no, I was just asking Fortune Book Club to look at the book. I'm not threatening anybody. There is no pressure being applied against anybody.

Suppose, finally, that the subject of the book then wrote your lawyer a letter saying we're not pressuring or threatening anybody, we just asked Fortune Book Club to look at the book.

In your judgment, on the basis of those facts, would you be entitled to advertise that the subject had tried to suppress the book?

A I would be suspicious and with [legal] advice I would probably advertise it as a question, did Du Pont try to suppress this?

Q Or would you perhaps say, is this a book that Du Pont doesn't like?

A Possibly.

Q Would you find that an effective way to advertise the book?

A I would like to be a little more shrill about it . . . .

Q Not at the expense of integrity, however, would you?

A I don't see how anybody's integrity is violated.

Q I was thinking of yours.

A *When it comes to selling books, I know no shame.* (Emphasis added) (Tr. 669-71).

The duty of performance under this contract did not require P-H to become "utterly without shame." Performance under a contract does not require the performing party to do anything dishonorable, or to misrepresent facts, or to state that in which it does not believe.

It is no answer to say that the contention could have been made by framing it in the form of a question. That might avoid a libel, but it would not be an act required of P-H.

Furthermore, the author himself, his agent Collier, and P-H management, especially Mr. Daly, did attempt to publicize the claimed Du Pont effort to "suppress the Book." Cavin testified (Tr. 104) that in late September or early October, 1974, when he realized P-H was not going to "publicize this

Du Pont—Book-of-the-Month Club incident" he had a conversation with Zilg. Cavin told Zilg that P-H was not going to publicize the allegations concerning Du Pont. Later, Zilg advised Cavin that he had been trying to get people on magazines such as Time and Newsweek interested in the story, but nothing came of it.

Cavin, if he is to be believed on the point, was successful through personal friendship in obtaining the assistance of an investigative reporter of the *New York Times* to look into the claim of improper interference by Du Pont; this led to a couple of news articles of an inconclusive nature, which appeared at or about the time that the Book had gone out of print, and did not help the sales to any extent.[34] *See* Tr. 107-10.

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[34] Cavin testified (Tr. 107):

> "I went to a friend of mine who had some contacts and told him the story pretty much as it's been . . . recounted here, and asked him for help and he knew Herbert Mitgang, on the editorial board of The New York Times, one of the board of editors, and through Herbert Mitgang, a reporter on The New York Times, Alden Whitman, was assigned to the story."

The Court does not necessarily accept the truth of this somewhat unusual account. It seems doubtful that a prestigious newspaper would assign a reporter to a matter of this sort solely on the representation of an editor employed by a book publisher desiring to sell books, received through a "friend with contacts." It seems more likely that the "contact" or friend of *The New York Times* editorial board member would have been told to advise Cavin to have his employer take out an ad, or issue a press release. The suggestion that personal friendships, favoritism or contacts will obtain the assignment of a reporter to a "story" to hype a book is hardly in keeping with the prestigious image of a large nationally respected newspaper; particularly when the purpose of having the story appear in print was to stimulate controversy to increase sales, a matter usually attended to by placing paid advertisements in the newspaper. The newspaper is not a party to this lawsuit, and the parties had no interest in cross-examining Cavin on this point.

In any event, regardless of how he became assigned to the matter, Mr. Whitman did interview Cavin a week or two prior to January 21, 1975. Cavin refused to speak on the telephone, insisting on a face to face meeting.

As Grenquist observed correctly, the publicity was more adverse to P-H than it was to Du Pont. (Tr. 110).

No liability is found on the part of P-H for any failure to publicize the "Du Pont effort to suppress the Book". Actually there is no evidence that Du Pont attempted to "suppress" the Book, and P-H did not believe Du Pont did so. At most, Du Pont attempted to get the top executives of BOMC to re-examine the selection by the editorial department of the Fortune Book Club. This was easy; all Du Pont had to do was to get BOMC-Brown to read the Book himself, as we have discussed earlier. Claim # 5 lacks merit.

Claim # 4 above, does not constitute a breach on the part of P-H. There was no requirement for P-H to sue Du Pont or Fortune Book Club. Its potential damages recoverable from BOMC, while greater than those of Zilg, would have been *de minimis* in any event.[35]

All that P-H was required to do was to use its best efforts in accordance with abilities, to promote the Book fully and fairly. On this it fell down for the reasons essentially stated herein, and its breach arises only out of the drastic unexplained cutting of the advertising budget and the cutting of the print order, which in turn allowed the Book to go out of print just as it began to gain sales momentum.

Cavin gave reporter Whitman his version of the "story of the Book-of-the-Month Club, the story that we have gone through here [at trial]." (Tr. 109). Also, Daly of P-H turned over his entire file on the matter to Mr. Whitman. Mr. Grenquist also had a telephone conversation with Mr. Whitman. The resulting news story, published January 21, 1975, is in evidence as Exhibit 344.

[35] While the gross shares of author and publisher in the BOMC royalty were equal, the publisher's half was net, and free of any commission to the literary agent.

Computation of Damages

Plaintiff claims six separate items of damage:

1. Lost royalties from the sale of the first regular hard cover trade book edition (claimed at between $43,650 and $92,150).

2. Loss of advance royalties from the sale of domestic paperback rights (claimed at between $25,000 and $75,000).

3. Loss of proceeds from sale of foreign and dramatic rights (claimed at between $5,000 and $100,000).

4. Lost royalties from sales to Fortune Book Club members (claimed at between $150 and $810).

5. Punitive damages of $1,000,000.

6. Loss of advance royalties for proposed second book by Zilg (claimed at between $25,000 and $50,000).

See Plaintiff's Memorandum on Damages, docketed Oct. 23, 1981, at 11-21.

There can be no dispute that plaintiff "is entitled to the reasonable damage[s] flowing from the breach" of his contract with P-H. *Perma Research & Development* v. *Singer*, 542 F.2d 111, 116 (2d Cir. 1976), *cert. denied* 429 U.S. 987 (1976). As the New York Court of Appeals stated in *Freund* v. *Washington Square Press*, 34 N.Y.2d 379, 382 (1974):

> "[T]he law awards damages for breach of contract to compensate for injury caused by the breach—injury which was foreseeable, i.e., reasonably within the contemplation of the parties, at the time the contract was entered into. . . . Money damages are substitutional relief designed in theory 'to put the injured party in as good a position as he would have been put by full performance of the contract, at the least cost to the defendant and without charging him with harms that he had no sufficient reason to foresee when he made the contract.' . . . In other words, so far as possible, the law attempts

> to secure to the injured party the benefit of his bargain, subject to the limitations that the injury—whether it be losses suffered or gains prevented—was foreseeable, and that the amount of damages claimed be measurable with a reasonable degree of certainty and, of course, adequately proven. . . . But it is equally fundamental that the injured party should not recover more from the breach than he would have gained had the contract been fully performed." (Citations omitted, quoting 5 Corbin, *Contracts*, § 1002, pp. 31-32 and 11 Williston *Contracts* (3d ed.), § 1138, p. 198).

The basic rule is that the aggrieved party should be placed in the same economic position which he would have attained had the contract been fully and fairly performed. *E.g.*, *Miller* v. *Robertson*, 266 U.S. 243, 257 (1924); *Perma Research & Development* v. *Singer Co.*, 542 F.2d at 116; 11 Williston, *Contracts*, § 1138, p. 198.

A plaintiff seeking damages in a breach of contract case has a two-fold burden. First, he must establish that the defendant's actions were the "proximate and natural" cause of plaintiff's claimed injury. *E.g.*, 11 Williston, *Contracts*, § 1344, p. 226. "It is elemental that a plaintiff can recover only that part of a given loss which is attributable to the defendant's wrongful conduct." *Bonime* v. *Doyle*, 416 F.Supp. 1372, 1383 (S.D.N.Y. 1976), *aff'd. without opinion*, 556 F.2d 554 (1977), *cert. denied sub. nom. Sloan* v. *Bonime*, 434 U.S. 924 (1977).

In this regard, the requirement of proximate cause in order to be able to recover damages is often confused with the requirement of certainty as to the amount of damages which is discussed below. The proximate cause requirement "precludes the recovery of uncertain damages [which] are not the

certain result of the wrong, not . . . those damages which are definitely attributable to the wrong and only uncertain in respect to their amount." *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 563 (1931). *See Perma Research & Development* v. *Singer Co.*, 542 F.2d at 116.

Second, the plaintiff must establish the amount of damages with reasonable certainty. *E.g.*, 11 Williston, *Contracts*, §§ 1346-47. "It is clear that the existence of damages must be certain—a requirement that operates with particular severity in cases involving artistic creations such as books . . . [because of] their dependence upon taste or fancy for success." *Contemporary Mission, Inc.* v. *Famous Music Corp.*, 557 F.2d 918, 925 (2d Cir. 1977).

Where damages are sought for the breach of a publishing contract, the plaintiff may establish the certainty of his damages by creating a "stable foundation for a reasonable estimate of royalties he would have earned had defendant not breached its promise to publish." *Freund* v. *Washington Square Press*, 34 N.Y.2d at 383. *See Contemporary Mission, Inc.*, *supra* at 926. Where "the damages which would have compensated plaintiff for anticipted royalties were not proved with the required certainty" the plaintiff's "claim for royalties falls for uncertainty." *Freund* v. *Washington Square Press*, 34 N.Y.2d at 383-84, 383.

It is clear that expert testimony and specific "comparable" statistical evidence are admissible to prove a claim to such royalties. *Contemporary Mission, Inc.* v. *Famous Music Corp.*, 557 F.2d at 927; *Bloor* v. *Falstaff Brewing Corp.*, 454 F.Supp. 258, 277 (S.D.N.Y. 1978), *aff'd.* 601 F.2d 609 (2d Cir. 1979). Such evidence is appropriate for use in assessing damages so long as it is not "pure speculation or guesswork." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). *See Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556, 566 (2d Cir. 1970).

It is then within the exclusive province of the trier of fact to determine the appropriate weight to be given to the expert's testimony and draw "just and reasonable inference[s]." *Bigelow* v. *RKO Radio Pictures, Inc.*, *supra* at 264. *See Autowest, Inc.* v. *Peugeot, Inc.*, *supra* at 566.

Experts' opinion testimony must be based upon facts established at trial and the reasonable inferences flowing therefrom. *Perry* v. *Allegheny Airlines, Inc.*, 489 F.2d 1349, 1353 (2d Cir. 1974); *McFarland* v. *Gregory*, 425 F.2d 443, 448 (2d Cir. 1970); *Cassano* v. *Hagstrom*, 5 N.Y.2d 643, 646 (1959). Experts may not base their conclusions upon unsupported assumptions and opinions, *Franzese* v. *Mackay Trucking Corp.*, 10 App.Div.2d 713 (2d Dept. 1960), nor upon guess, speculation or conjecture, *Craig* v. *Champlin Petroleum Co.*, 435 F.2d 933, 937 (10th Cir. 1971); *Kale* v. *Douthitt*, 274 F.2d 476, 482 (4th Cir. 1960).

"[T]he test for admissibility of evidence concerning prospective damages is whether the evidence has any tendency to show their probable amount." *Contemporary Mission, Inc.* v. *Famous Music Corp.*, 557 F.2d at 926. *See Duane Jones & Co.* v. *Burke*, 306 N.Y. 172, 192 (1954). A naked opinion based upon unsupported speculation or conjecture provides little or no guidance for the trier of fact. *See generally, Perma Research & Development* v. *Singer Co.*, 542 F.2d at 123 (Van Graafeiland, J., dissenting).

Plaintiff here seeks to recover damages for the loss of royalties from the sale of the first regular trade edition of the Book, which plaintiff projects to be between $43,650 and $92,150. The trial testimony and exhibits contain various conflicting pre-publication estimates and hindsight-testimony predictions of the potential sales for the Book.

On June 15, 1972 when Zilg's partial manuscript was submitted to P-H, Cavin, an experienced editor, wrote the pre-

contract "Book Proposal", seeking to assist his superiors at P-H in deciding whether to buy the rights to the Book. Cavin estimated first year sales at 12,000 copies; second to fifth year sales in total at 16,000 copies; giving a total sales estimate for the hard cover, or trade edition, of 28,000 copies. Ex. 17. These were Cavin's estimates although they were apparently written down by someone else, *see* Tr. 19-20, 145-46.

On March 28, 1974 when the manuscript was completed and ready for printing, the Book Production Committee at P-H met, and prepared the "Book Production Sheet—P-H, Inc." for Zilg's book. The Committee estimated first year sales at 12-15,000 copies; second to fifth year sales at 3-5,000 total additional copies; and total sales at 15-20,000 copies. Ex. 50. *See* Ex. 81. Cavin, who recorded the Committee's projections, also recorded his own projections of first year sales at 20-25,000 copies; second to fifth year sales at 5-10,000 copies; with total hard cover sales of 25-35,000 copies. Ex. 50. See Tr. 44-46. Cavin, however, admitted at trial that his earlier estimates were considered more reasonable by the other experienced P-H editors and executives. Tr. 146.

At trial, plaintiff presented two expert witnesses as to the Book's potential sales. Carl Brandt, a qualified and experienced literary agent, estimated total sales of the Book, if properly published and promoted, to be anywhere between 15-30,000 copies, based upon his experience and a comparison with other books. Tr. 1470. Peter Shepard, a literary agent currently employed by the plaintiff, estimated the range for total sales of the hard cover edition of the Book, if properly published and promoted, to be between 25-125,000 copies, with 50,000 copies as his closest estimate. Tr. 724-25.

Neither of plaintiff's experts compared the Book to the many other books recently published about the du Pont family, or to other similar books concerning American history or bio-

graphy by first-time authors. Rather, they chose to compare Zilg's book to works by established authors, on topics of broader popular interest, such as Joseph C. Goulden's "The Super Lawyers" and "The Benchwarmers;" Steven Birmingham's "Our Crowd" and "Real Lace;" William Shannon's books on the Irish in America and on the Kennedy family; Peter Collier and David Horowitz' "The Rockefellers;" and Mathew Josephson's "The Robber Barons." Tr. 694-707, 1476-93; Ex. 581a. These books are not truly comparable works, either as to subject matter, authors' professional standing or intrinsic quality, with the subject Book.[36]

Defendant P-H presented one expert witness on the issue of damages at trial, David Replogle, an employee of Doubleday. He estimated potential sales for the Book to be 10-15,000 copies. In making his estimate, Replogle considered as comparable, books such as Robert Hutchinson's "Vesco" and Robert Payne's "Life and Death of Adolph Hitler." Tr. 1583, 1596.

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[36] Plaintiff's expert Peter Shepard based his estimates on comparisons with the following books:

"The Rockefellers" by Peter Collier and David Horowitz (Holt, Rinehart & Winston, 1976) which was a BOMC Main Selection; this book sold 30-50,000 copies in hard cover and the hard cover publisher was paid an advance of $300,000 for the paperbook rights.

"The Robber Barons" by Matthew Josephson (Harcourt Brace, 1934); this book has sold 54,000 copies in hard cover and 120,000 copies in paperback. However, it has long been used as required reading for college history courses.

"The Rich and the Super Rich" by Ferdinand Lundberg (Lyle Stuart, 1968) was a book club selection for the Literary Guild and was on the New York Times Best Seller List for 34 weeks. The book went through eight printings of the hard cover edition and 15 printings of the paperback edition. Eight foreign editions of this book were printed.

"The Seven Sisters" by Anthony Sampson (Viking, 1975) went through two printings of the hard cover edition and five printings of the paperback edition.

In determining what the potential hardcover sales for Zilg's Book would have been, had P-H performed faithfully, the Court has considered, *inter alia*, the following facts:

"The Arms of Krupp" by William Manchester was a book club selection for the Literary Guild, the History Book Club, and the Book Find Club. There were four printings of the hard cover edition which Shepard estimated to be 150,000 copies, and nine printings of the paperback edition.

"A Fortune in History" by Burton Hersh (William Morrow, 1978) told the story of the Mellon family of Philadelphia. This work sold less than 10,000 copies in hard cover.

"Ford" by Allan Nevins and Frank E. Hill (Scribner's) was a three volume book which sold about 15,000 copies in hard cover. (Tr. 695-716; Ex. 581A).

Plaintiff's expert, Carl Brandt, based his estimates on comparisons with the following books, for many of which Brandt acted as the literary agent:

"The Super Lawyers" by Joseph C. Goulden told the story of the powerful Washington, D. C. law firms. This was about Goulden's sixth book out of twelve or thirteen which he had written.

"The Bench Warmers" also by Joseph C. Goulden, is an expose of the federal judiciary. This was about Goulden's ninth book and he already had an established reputation according to Brandt. This book sold about 35,000 copies in hard cover.

"The Bombs of Palomares" by Tad Szulc was about his third book out of seven or eight books which he has written. It told of a historical incident involving a bomb dropped in the Mediterranean region. This book sold about 10-20,000 copies in hard cover.

"The Illusions of Peace" also by Tad Szulc is that author's most recent book. It has sold about 7,000 copies even though Brandt projected sales to be 20-30,000 copies.

A book about Europe by Don Cook sold 12,000 copies although Brandt projected sales to be 15,000 copies.

"Our Crowd" by Stephen Birmingham told the history of the German Jews in the United States. Brandt projected sales of 75-80,000 copies, however, the book has sold about 125,000 copies.

"Real Lace" also by Stephen Birmingham told about the Irish in America and has sold 80,000 copies. Brandt projected sales to be 75-100,000 copies.

Brandt also considered William Shannon's book on the Irish in America and his book on the Kennedy family published by Mac-

1. The subject matter of this Book from the doctrinaire viewpoint taken by this author, is of little general or popular interest except in Delaware, or among "revisionist" historical circles.

2. The Book contains approximately 230,000 words and is 623 pages long, plus photographs, charts, prefaces, etc. It is exactly two inches thick and weights in excess of 3½ pounds. It is not the sort of book that the casual, leisure-time reader would pick up at the corner bookstore or buy from an airport bookseller. Rather, this very substantial looking book would be purchased only by very committed, highly interested readers or by reference libraries.

3. The price of the Book, $12.95, was very high by 1972-73 book publishing standards and by comparison with consumer prices and income during the period.

4. Cavin's pre-publication estimates of the Book's potential were slightly exaggerated out of pure self-interest or "puffing"—he wanted to show that he had signed a "blockbuster" for the firm, and if he convinced P-H that the Book was a blockbuster, then more money would be spent on promoting the Book, so his opinion would become a self-fulfilling prophecy. *See* Tr. 20, 146, 1011-12.

5. Cavin and Shepard's trial testimony as to the potential of Zilg's Book were also self-interested "puffing." Cavin, no longer employed at P-H, wanted to show that he did have a blockbuster, but that P-H ruined it. Mr. Shepard is Zilg's pres-

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millian. The latter book sold 28-30,000 copies, although Brandt had projected sales of 20-25,000 copies. (Tr. 1476-93).

Defendant P-H's expert David Replogle based his testimony upon his past experience in publishing about 4,000 books and particularly upon a comparison of Zilg's book with "Vesco" by Robert Hutcheson which was an expose of securities fraud and had a business interest similar to Zilg's book. This book was, apparently, also by a first-time author. It sold about 12,000 copies in hard cover following a projection of 10-15,000 copies. (Tr. 1562, 1583).

ent literary agent whose interest and bias favors a result by which this Court would find in favor of Zilg and grant him substantial damages.

6. The Book's advance sales of 7,041 copies almost met the pre-production estimates of advance sales 7,500 copies made by the P-H Book Production Committee, long before any dispute arose. At least this part of the pre-production estimates of the Committee at P-H was right on target.

7. Defendant P-H, by cutting the printing order for the Book from 15,000 copies to 10,000 copies without a valid business reason, intentionally permitted the Book to go out of print at a time when the Book was just beginning to receive considerable publicity and favorable reviews, *e.g.*, the December 15, 1974 *New York Times* Book Review, Ex. 273, and while the BOMC-Du Pont situation was first receiving public notice.[37] Permitting the Book to go out of print at a time when its sales momentum was just beginning to build had a severe detrimental effect on sales.

8. The unexplained decrease in the advertising budget for the Book, without a valid business reason and at a time when the Book was beginning to gain sales momentum and obtain favorable publicity, discussed above, contributed to the failure of the Book to achieve its potential.

Based upon these factors and other evidence in the trial record, I conclude that defendant P-H's breach of contract caused the Book to sell less copies than it would have otherwise sold. However, Zilg's claim that the Book would have sold 35-60,000 copies or more is not supported by substantial

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[37] P-H claims that the accumulation of forty-one recorded back-orders for 594 copies of the Book does not reflect a brisk rate of sale and although out of print with the publisher, copies of the Book were available from wholesalers or jobbers. However, bookstores generally prefer to purchase directly from the publisher for reasons of purchase price and discounts.

evidence in the trial record. In fact, Zilg himself, with the expert assistance of Collier, Shepard and others, was unable to promote the Book once the publication rights reverted to him, on or about June 28, 1977. Ex. 506. Had P-H not breached its contract with Zilg, the Book would have sold 25,000 copies in the hard cover trade edition.

Under plaintiff's publishing contract with P-H, Ex. 18, his royalty is 15% on all sales over 10,000 copies. The list price for the Book was $12.95. Plaintiff would receive 15% of this, or $1.94 per book sold. There were 13,000 copies of the Book actually printed, and approximately 12,500 copies were sold by P-H with the rest remaindered to the plaintiff at cost. Had the Book sold 25,000 copies, as I find it would have, Zilg would have received an additional $24,250. Plaintiff is entitled to recover this sum, plus pre-judgment interest from June 28, 1977.[38]

Plaintiff also claims that he is entitled to damages for lost royalties for sales which would have been made to members of the Fortune Book Club, above and beyond the $3,000 minimum royalty guaranty, which P-H received from BOMC and shared with the plaintiff according to their agreement. I find that P-H is not liable for BOMC's rejection and refusal to

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[38] Paragraph 14 of Zilg's contract with P-H (Ex. 18) sets forth the circumstances under which that Agreement shall terminate, and all rights in the Book shall revert to the author. The trial record shows that on June 28, 1977, before this lawsuit was commenced, the parties agreed to and did treat the publishing contract as terminated; P-H remaindered its unsold copies of the Book to Zilg at cost, to be distributed by him, and all rights in the Book reverted to him as provided in the Agreement. *See* Ex. 506. The Court believes that June 28, 1977 represents the most appropriate date from which pre-judgment interest should accrue, because that date is the earliest ascertainable date on which the plaintiff treated defendant P-H as being in breach of its contract. New York C.P.L.R. § 5001; *Perrin Const. Co. v. Johnson*, 42 A.D.2d 814, 815 (4th Dept. 1973). No factual basis exists in the record from which this Court could determine any specific earlier date on which to commence the accrual of prejudgment interest. *Id.*

publish its edition of the Book. Both before and after BOMC's refusal to publish the Book, P-H made reasonable, good faith efforts to sell the Book to another book club, and in fact ultimately did sell it to the McGraw Hill Business Management Book Club. Plaintiff received the financial benefit of that sale of subsidiary or "book club" rights. He is not entitled to recover any damages for lost royalties relating to potential sales to members of the Fortune Book Club from P-H, because that damage or loss was not the fault of P-H. P-H had no duty to this plaintiff to sue BOMC for breach of contract. To do so would not have been commercially reasonable. P-H used its best efforts short of litigation to get BOMC to take the Book, and P-H lost more money by reason of BOMC's refusal to do so than did Zilg.

Plaintiff also claims that he is entitled to lost advance royalties from the sale of the paperback rights; lost profits for the sale of the foreign and dramatic rights to the Book; and lost advance royalties for his second or other future books.

In support of these claims plaintiff relies on the testimony of his experts, Brandt and Shepard. However, the estimates of Brandt and Shepard are unsupported conjecture; on these points they are not based upon any comparable statistical evidence or other competent proof.

P-H made reasonable efforts to sell the paperback rights, however, its efforts failed. The obvious problem with this effort was that the Book is too long and too expensive to be a successful, inexpensive paperback for a general readership market. Zilg himself, aided by his literary agents, after the work reverted to him, has apparently been unable to sell the paperback rights.

P-H also made reasonable good faith efforts to sell the foreign and dramatic rights to the Book, although these rights were reserved to the plaintiff and P-H had no obligation to at-

tempt to sell them. The only foreign interest which could be aroused through the joint and several efforts of the plaintiff, his agents and P-H involved the sale of the Japanese rights to a Japanese company. Notwithstanding the French origins of the du Pont family, nobody has been able to arouse any European interest in the Book.

On January 11, 1974 Zilg entered into a contract with P-H for Zilg's second book, bearing the high-flown tentative title of "The Betrayal of Pope John: The End of the Catholic Church—The Twilight of Vatican Power." At trial Mr. Zilg stated that he "worked on it [the new book] for about a year. And then after my problems with you people [P-H], I decided to shelve it and then I paid you back [the advance]." (Tr. 417). Plaintiff never completed the manuscript for his second book and he never tried to interest another publisher in this book. Instead he decided to pursue a career in newspaper and magazine journalism. P-H is not liable for Zilg's voluntary decision to abandon his second book, and make a voluntary career change.

Plaintiff has failed to meet his burden of proof as to these items. He has not proven that P-H's breach of contract was the proximate cause of such claimed injuries, and he has failed to establish the amount of his damages, if any, flowing therefrom with reasonable certainty. He has also failed to establish any injury to his literary or business reputation.

Plaintiff's final claim is that he is entitled to One Million Dollars in punitive damages. Punitive damages are not available in New York in actions for breach of contract. *Durham Industries, Inc.* v. *The North River Ins. Co.*, Nos. 81-7035, 81-7395 (2d Cir. Feb. 25, 1982), slip op. at 1453.

The foregoing constitutes the findings of fact and conclusions of law of the Court after trial pursuant to Rule 52, F.R.Civ.P. The Clerk shall enter a final judgment in favor of

plaintiff and against defendant Prentice-Hall, Inc. in the amount of $24,250.00, with pre-judgment interest from June 28, 1977 to June 24, 1981 at the rate of 6% per annum, and from June 25, 1981 to the date of the judgment at 9% per annum, and costs to be taxed. The judgment shall provide that plaintiff take nothing against co-defendant E. I. du Pont de Nemours & Company, Inc.

So Ordered.

Dated: New York, New York
April 20, 1982

/s/_____
Charles L. Brieant
U. S. D. J.

Appendix D.

Gerald Colby ZILG, Plaintiff,

v.

PRENTICE-HALL, INC. and E. I. duPont de Nemours & Company, Inc., Defendants.

No. 78 Civ. 0130-CLB.

United States District Court, S. D. New York.

June 9, 1981.

MEMORANDUM AND ORDER

BRIEANT, District Judge.

Plaintiff, the author of *duPont: Beyond the Nylon Curtain* (the "Book"), commenced this action against his publisher, Prentice-Hall, Inc. and against E.I. duPont de Nemours & Co., Inc. ("duPont") alleging as against Prentice-Hall that it failed to meet its contractual obligations as a publisher to promote his Book in good faith. Mr. Zilg contends that the codefendant, duPont, interfered with this contract, and another contract pertaining to the subsidiary rights to his Book, entered into by Prentice-Hall with the Fortune Book Club. Plaintiff contends that after learning of duPont's claims of untruthfulness and objections to the form and content of the Book, Prentice-Hall ("PH"), as a result thereof, altered its advertising and promotion plans for the Book to the author's detriment.

Specifically, plaintiff alleged:

(1) PH cut the first printing of the Book from 15,000 to 10,000 copies;

(2) PH reduced the advertising budget (however firm or tentative it may have been) by almost 2/3rds;

(3) PH did not publicize the duPont effort to suppress the book or cooperate with the author in this regard;

(4) Despite the clear adverse effect on the book, PH did not bring suit or otherwise pursue potential legal action against duPont or [Fortune Book Club];

(5) PH's conduct almost blocked [plaintiff's] efforts with respect to serialization of the book in the Delaware State News, and PH failed to make effective use of the serialization to promote advance sales;

(6) PH failed to keep sufficient books in stock to meet demand for the book; and

(7) PH failed to inform [plaintiff] of numerous material matters relating to publication and promotion of the book." Affidavit of Gerard Colby Zilg, sworn to May 5, 1981, at 11-12. By motion argued on May 20, 1981, defendant Prentice-Hall moved for summary judgment.

The publishing agreement entered into on June 23, 1972 between the plaintiff author and publisher Prentice-Hall provided, *inter alia*, that:

> "1. The Author grants to the Publisher the exclusive right to publish in the English language in book form in the United States of America, its territories and possessions, Canada, and the Republic of the Philippines an unpublished work tentatively entitled DU PONT: Behind the Nylon Curtain and also the exclusive subsidiary rights listed in paragraph 5 below during the full term of copyright and all renewals or extensions thereof.
>
> * * *

4. When the manuscript has been accepted and approved for publication by the Publisher and is ready for publication, it will be published at the Publisher's own expense. The Publisher will pay the Author royalties from its sale of the published work, said royalties to be computed and shown separately, as follows: [Royalty Schedule omitted].

• • •

12. The Publisher shall have the right: (1) to publish the work in such style as it deems best suited to the sale of the work; (2) to fix or alter the prices at which the work shall be sold; (3) *to determine the method and means of advertising, publicizing, and selling the work, the number and destination of free copies, and all other publishing details, including the number of copies to be printed,* if from plates or type or by other process, date of publishing, form, style, size, type, paper to be used, and like details." (Emphasis added).

The first issue raised by defendant in its summary judgment motion is whether Prentice-Hall had any obligation to act in good faith in determining how to promote the plaintiff's Book. The parties recognize that under the applicable New York law,[1] every contract contains an implied covenant of good faith performance and fair dealing. As the New York Court of Appeals recognized in *Van Valkenburgh, Nooger & Neville, Inc.* v. *Hayden Publishing Co.*, 30 N.Y.2d 34, 281 N.E.2d 142, 330 N.Y.S.2d 329, *cert. denied* 409 U.S. 875 (1972), "There is implicit in all contracts — for book publishing or house building — an implied covenant of fair dealing and good faith [citations omitted]." 30 N.Y.2d at 45.

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[1] Paragraph 19 of the contract provided that it would be "construed and interpreted" according to New York Law.

Prentice-Hall contends, however, that the contractual provision which grants it the right to determine how the book will be promoted (¶12), bars recovery by the plaintiff on the basis that the defendant failed to promote the Book in good faith. Defendant relies on the general proposition that a court will not imply a contract term when the contract itself contains an express term dealing with the subject, *see, e.g., Burr* v. *Stenton*, 43 N.Y. 462 (1871) and *V.T.R. Inc.* v. *Goodyear Tire & Rubber Co.*, 303 F.Supp. 773 (S.D.N.Y. 1969). In *V.T.R.*, the court concluded that "[a]s to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct." 303 F.Supp. at 778.

The implication of a requirement that the publisher make its determination as to all publishing details in good faith does not conflict with any express provision of the publishing contract other than arguably ¶12 which gives it the "right to determine" those details. Requiring the publisher to exercise its discretion in good faith would not deprive it of any bargained for benefits under the contract. In *Contemporary Mission, Inc.* v. *Famous Music Corp.*, 557 F.2d 918 (2d Cir. 1977), the Court of Appeals considered a similar contract provision which provided that the defendant would be relieved of its obligation to promote the plaintiff's recordings "if, as and when, in the sole option of [defendant], such promotion should cease to be effective and profitable." The Court concluded that under New York law, any determination of effectiveness or profitability of promotion would have to be made in good faith. 557 F.2d at 923, n.8. This Court concludes that the defendant in this case was likewise required to exercise its discretion in good faith in planning its promotion of the Book, and in revising its plans.

The remaining issue is whether defendant is entitled to summary judgment on the basis that it fulfilled its good faith obli-

gations under the contract. The plaintiff author granted the publisher the exclusive right to publish his Book. If the contract had been entirely silent on the duty of the publisher to promote the Book, defendant would have been obligated to use its reasonable efforts to promote the sale of the Book. *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917). Paragraph 12 of the contract gave Prentice-Hall the right to determine the publishing details, including how the Book should be promoted. The requirement that defendant exercise this discretion in good faith could not, of course, obligate it to expend more than fair and reasonable efforts to promote the author's Book.

All that this contract requires is that the publisher make its determination in good faith, and accordingly Prentice-Hall would not breach the contract if the relevant decisions it made were guided by any legitimate business purpose. It would violate its contractual duty if it provided less than reasonable efforts to promote the Book and did so in order to deprive the plaintiff of the benefits he would otherwise have received under the contract. *See, Collard* v. *Incorporated Village of Flower Hill*, 75 A.D.2d 631, 427 N.Y.S.2d 301 (2d Dept. 1980); *Pernet* v. *Peabody Engr. Corp.*, 20 A.D.2d 781, 248 N.Y.S.2d 132 (1st Dept. 1964)

Generally, whether a party to a contract has failed to act in good faith will be a question of fact (*Pernet* v. *Peabody Engr. Corp.*, 248 N.Y.S.2d at 135 and cases cited therein), not to be resolved by motion unless viewing the evidence most favorably to the party moving, no reasonable trier of the fact could find otherwise.

Defendant has submitted voluminous affidavits to the Court setting forth in detail the activities it undertook to promote plaintiff's Book. It has also offered its explanations for the changes in the promotion plans and its claimed omissions following the protest of duPont about the Book's content, which plaintiff contends demonstrate bad faith.

The burden plaintiff must meet here to prove that the defendant failed to act in good faith is substantial. However, intent can rarely be established by direct evidence, and must often be proved circumstantially and by inference. Intent is therefore peculiarly inappropriate to be decided on a motion for summary judgment. *See, e.g., Sterling National Bank & Trust Co. of N.Y.* v. *Fidelity Mortgage Investors*, 510 F.2d 870, 875 (2d Cir. 1975); *Empire Electronics Co.* v. *United States*, 311 F.2d 175, 180 (2d Cir. 1962); *Weight Watchers of Quebec Ltd.* v. *Weight Watchers International Inc.*, 398 F.Supp. 1047, 1056 (E.D.N.Y. 1975). As a matter of discretion this Court concludes that plaintiff's claims against Prentice-Hall should be resolved on a plenary trial record, and that it would be inappropriate to grant summary judgment under all the relevant circumstances here present. *See, Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948); *Petition of Bloomfield Steamship Co.*, 298 F.Supp. 1239, 1242 (S.D.N.Y. 1969), *aff'd.* 422 F.2d 728 (2d Cir. 1970).

Motion for summary judgment by defendant Prentice-Hall is denied. A conference to set a trial date will be held on September 9, 1981 at 9:30 A.M. in Courtroom 705. Counsel are alerted to be ready for trial shortly thereafter, depending on the then status of criminal cases or preferred civil cases.

So Ordered.

No. 83-1364

IN THE

Supreme Court of the United States

October Term, 1983

GERARD COLBY ZILG,

Petitioner,

v.

PRENTICE-HALL, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counterstatement of Questions Presented

1. Should this Court exercise its supervisory power over federal courts to go outside the record and reverse a unanimous decision of a United States Court of Appeals because of the unsupported allegation that the Court of Appeals' decision was politically motivated, where the Court of Appeals explicitly rested its decision upon a plaintiff's failure to meet his burden of proof and the trial court's imposition of an erroneous state law standard to the facts before it?

2. Assuming, without conceding, that the Court of Appeals overturned findings of fact subject to F.R.Civ.P. 52, was that reversal fatally defective for having failed to employ the words "clearly erroneous" when the Court of Appeals explicitly found an absence of evidence in the record to support the findings?

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No. 83-1364

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Counterstatement of the Case

The chronological gaps left by the Petition's Statement of the Case are crucial to any fair understanding of the Record. It will be noted that the Petition studiously avoids precise dating of events, preferring such usages as "in mid-1974," "after," and "as a consequence." (Petition, 8-9).

So, for example, the Petition's discussion of Judge Brieant's finding that Respondent Prentice-Hall, Inc. "*intentionally* permitted" [emphasis added] Petitioner's book to go temporarily out-of stock ignores the facts that the reduction in the first printing was ordered on September 9,

1974; that a reprinting was ordered December 26, 1974 (when over 10% of the original printing was still in stock) for January 30, 1974 delivery; that the reprint order was increased by 20% on December 31, 1974; and that the out-of-stock situation which arose in January[1] (and which the District Court termed "brief" (Petition, 84a)) was extended because of late delivery from a printer.

By avoiding reference to these lengthy gaps, the Petition does more than confuse: it obscures the fact that New York legal standards of good faith and reasonableness were supplanted in the District Court by an unprecedented standard of "best efforts" performance which involved hindsight criticism of a business executive's inability to prognosticate events as much as four months in the future.

Respondent argued vigorously in the Court of Appeals that many findings by the District Court of fact, of law, and of mixed fact and law were clearly erroneous, whether or not the standard of *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) is applicable to all such categories. The Court of Appeals did not reach the question of the infirm findings of fact. Instead, the Court of Appeals chose to focus on the District Court's errors of law: redefining bad faith by the "best efforts" standard, shifting the burden of proof, and failing to recognize risk management as a legitimate business reason for Respondent's actions.

Nevertheless, Respondent must reserve the right to invoke the entire Record should this Court elect to grant the

1. The District Court did not make a finding as to the date on which the out-of-stock situation arose.

Petition, since manifest error by the District Court in its fact findings would have justified reversal by the Court of Appeals on the basis of the "clearly erroneous" rule had the Court of Appeals so elected.[2]

Summary of Argument

This case presents nothing more or less than disagreements between the District Court and the Court of Appeals (i) on how to construe a contract so as to rationalize potentially conflicting terms, (ii) on the scope of the implied duty of good faith which the common law of New York impresses on all contracts, and (iii) on whether risk management is a legitimate business purpose for the acts of a discretion-exercising party to a commercial contract. These

2. For example, the District Court simply misread the date of a document when it asserted that the first printing of the book was fixed at 15,000 copies a month before the execution of the Agreement for Fortune Book Club use. (Petition, 87a). It ignored uncontroverted documentary and testimonial evidence that Fortune Book Club and other Book of the Month Club, Inc. ("BOMI") operations had bought books and printed and folded sheets from Respondent to find that BOMI never did so, and grounded the serious charge of fabrication of evidence on that erroneous finding of BOMI's practices. It effectively ignored the existence of the wholesalers who had purchased half the book's initial printing in constructing consequences of the temporary "out-of-stock" situation nowhere supported by the Record. (*see* Petition, 108a n.37).

Equally gnawing but less consequential errors appear in the District Court opinion: one person who never testified and whose deposition was not introduced into evidence is said to have "testified at trial" (Petition, 26a); the Executive Vice-President of Houghton Mifflin Company, indisputably the best-credentialled expert to testify, is misidentified as an "employee of Doubleday" (Petition, 105a); and Petitioner is said to have "cancelled" an earlier contract for the book with David McKay Company (Petition, 26a), when the uncontested documentary evidence had it that McKay cancelled the contract when Petitioner failed to submit an acceptable manuscript.

are important issues, to be sure;[3] but they are issues of state law pure and simple.[4]

To the extent the Federal Rules of Civil Procedure are involved, Respondent argues that the construction of a contract to determine the scope of a party's contractual duties is an issue of law not subject to Rule 52. Respondent further argues that the Court of Appeals found an absence of evidence in the record on issues where Petitioner bore a substantial burden of proof, and properly reversed a District Court decision which effectively put that burden on Respondent.

The Court of Appeals held, in sum, that risk management (i.e., a publisher's right to control the amount of money it will invest in a project where it has no guarantee of return) was a legitimate business reason for Respondent to do as it did, given the uncontroverted evidence that Respondent's efforts for this book were, at a minimum (and in the words of Petitioner's own expert witness), "perfectly adequate" for the book to catch on with the public and be sold. In so holding, the Court of Appeals had no need to overrule any finding of fact by the District Court, and it did not do so.

The Petitioner invokes the First Amendment in suggesting that the three distinguished judges of the Court of Ap-

3. Though not for the reasons ascribed by the Petition, whose preposterous reference to the *amicus* appearance below by the Authors League of America (Petition, n.10) doesn't mention that the appearance—with the exception of two sentences in the League's Brief—dealt solely with the Petitioner's claim against the codefendant du Pont Company.

4. Although New York law governs the agreement of which breach is claimed, no New York cases on the scope of the implied duty of good faith are included in Petitioner's Table of Authorities.

peals who unanimously reversed the District Court violated their oaths of office by allowing Petitioner's politics to determine their decision. This charge is breathtakingly cynical: the District Court is exonerated of bias, despite what could be called its diatribe against the book (Petition, 36a-52a),[5] only because it ruled for Petitioner (Petition, n.11), while the only reason for inferring bias from the far milder Court of Appeals critique is that Petitioner lost in that Court. The Petition avoids any suggestion that the Court of Appeals may simply have been adopting District Court "findings of fact" as to the nature and appeal of the book.

No extensive argument will be presented on the charge of impropriety by the Court of Appeals, because a fair reading of the Court of Appeals' opinion demonstrates the objectivity of that bench. In any event, we are neither so clairvoyant nor so privy to the innermost thoughts and motives of the Court of Appeals as Petitioner claims to be.[6]

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5. As it happens, a great deal of Petitioner's Brief to the Court of Appeals constituted an attack on the District Court's alleged bias against Petitioner's politics in dismissing the case against the du Pont Company. Yet Petitioner has not sought review by this Court of either of the lower court decisions in favor of the du Pont Company, which one would think raise the same ersatz issue of political bias. Quite the contrary: Petitioner's description of Judge Brieant has gone from contumely to near-beatification.

6. The Petition further shows off its sensitivity to editorial nuance in judicial opinions by a footnote (Petition, n.4) which suggests that Judge Brieant didn't really mean to say "best efforts" the four times he so defined Respondent's contractual duties. (Petition, 83a, 89a, 99a and 110a). *See* Point II below. This is not reading between the lines; it is reading around them.

ARGUMENT

I.

The Construction of Undisputed Contract Language Is a Question of Law Not Subject to Rule 52.

The Court of Appeals correctly perceived that the entire controversy here depends upon what can be made of, or drawn from, the following terms of the agreement between Petitioner and Respondent:

> "3. The manuscript . . . will be delivered . . . by the AUTHOR to the PUBLISHER in final form and content acceptable to the PUBLISHER . . .
>
> "4. When the manuscript has been accepted and approved for publication by the PUBLISHER . . . it will be published at the PUBLISHER's own expense . . .
>
> "12. The PUBLISHER shall have the right: (1) to publish the work in such style as it deems best suited to the sale of the work; (2) to fix or alter the prices at which the work shall be sold; (3) to determine the method and means of advertising, publicizing, and selling the work, the number and destination of free copies, and all other publishing details, including the number of copies to be printed, if from plates or type or by other process, date of publishing, form, style, size, type, paper to be used, and like details."

The Court of Appeals described its function in this case as an attempt to resolve the extent to which "the [contract] language regarding promotional efforts and the promise to publish modify each other." (Petition, 17a).

The construction of undisputed contract language has long been held to be an issue of law not subject to Rule 52. *See, e.g., Eddy, et al.* v. *Prudence Bonds Corporation,* 165 F.2d 157, 163 (2d Cir. 1947), *cert. den.* 333 U.S. 845 (1948) (L. Hand, J.: ". . . appellate courts have untrammelled power to interpret written documents"); *Emor, Inc.* v. *Cyprus Mines Corporation,* 467 F.2d 770, 773 (3d Cir. 1972); *Taylor-Edwards Warehouse & Transfer Co. of Spokane, Inc.* v. *Burlington Northern, Inc.,* 715 F.2d 1330, 1333 (9th Cir. 1983); *In re Bubble Up of Delaware, Inc.,* 684 F.2d 1259, 1264 (9th Cir. 1982). There is no reason to disturb so longstanding and historically-mandated an interpretation of Rule 52.

II.

The District Court's Erroneous Grafting of the Legal Standard of Best Efforts onto the New York Common Law Implied Duty of Good Faith in the Performance of Contracts Presented the Court of Appeals With a Question of Law Not Subject to Rule 52.

The Court of Appeals' decision turned on its holding that the District Court had erred by wrongly (i) imposing upon Respondent the duty to exercise "best efforts" in the course of publishing Petitioner's book, (ii) holding that Respondent's alleged failure to provide reasons for its conduct to the District Court's satisfaction amounts to bad faith, and (iii) ignoring risk management as a legitimate reason for making business judgments.

Rule 52 has no application to such determinations of law. As this Court said in *Inwood Laboratories* v. *Ives Laboratories,* 456 U.S. 844, 855 n.15 (1982):

> "Of course, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard."

A brief summary of applicable New York law will put the District Court's error in relief. New York law has long held that what the implied covenant of good faith and fair dealing requires is honesty in fact and the avoidance of sharp practice and chicanery.[7]

New York's highest court has been unequivocal on the scope of the implied good faith obligation. In *Mutual Life Insurance Co.* v. *Tailored Woman, Inc.*, 309 N.Y. 248, 128 N.E.2d 401 (1955) (cited with approval in *Neuman* v. *Pike*, 591 F.2d 191, 195 (2d Cir. 1979)), the Court of Appeals refused to ascribe bad faith to a tenant who had relocated his fur business from a floor on which part of the rent was calculated as a percentage of gross sales. In the vacated space, the tenant began to conduct a low-revenue bargain store. The Court rejected the landlord's claim of breach of the implied covenant of good faith, finding that the tenant's decision to move the lucrative part of his clothing business was motivated by legitimate business reasons, rather than any dishonesty. "*Absent fraud or trickery* . . . defendant can carry on its business in the way that suited

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7. *See*, e.g., *Grad* v. *Roberts*, 14 N.Y.2d 70, 248 N.Y.S.2d 633 (1964); *Baker* v. *Chock Full O'Nuts Corp.*, 30 A.D.2d 633, 292 N.Y.S.2d 58 (1st Dept. 1968); *Guardino Tank Processing Corp.* v. *Olsson*, 89 N.Y.S.2d 691, 699 (Sup. Ct. N.Y. Co. 1949); *Random House, Inc.* v. *Gold*, 464 F.Supp. 1306 (S.D.N.Y. 1979); *Foster* v. *Callaghan & Co.*, 248 Fed. 944 (S.D.N.Y. 1918). Cf. *In re Heard*, 6 Bankr. 876, 870-80 (W.D.Ky. 1980). *See generally* C. Fried, *Contract As Promise: A Theory of Contractual Obligation*, at 74-91 (1981); Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith," 94 Harv. L. Rev. 369 (1980).

it . . ." 309 N.Y. at 248, 128 N.E.2d at 402 [emphasis added].

In *Gordon* v. *Nationwide Insurance Co.*, 30 N.Y.2d 427, 437, 334 N.Y.S.2d 601, 609 (1972), the Court of Appeals held that "bad faith requires an extraordinary showing of a disingenuous or dishonest failure to carry out a contract."

The same Court has similarly rejected a claim of bad faith where a plaintiff alleged that his colleagues had exercised an expulsion clause in their partnership agreement against him. After finding that embarrassment created by plaintiff's behavior had provoked the defendants' action, the Court nevertheless held that plaintiff had not demonstrated bad faith because he had not alleged or shown "even a suggestion of evil, malevolent or predatory purpose." *Gelder Medical Group* v. *Webber*, 41 N.Y.2d 680, 684, 394 N.Y.S.2d 867, 870-71, 363 N.E.2d 573, 577 (1977).[8] *Cf. Collard* v. *Village of Flower Hill*, 52 N.Y.2d 594, 604, 439 N.Y.S. 2d 326, 331, 421 N.E.2d 818, 823 (1981), where the Court of Appeals held that a party's charge of "capriciou[s] or arbitrar[y]" behavior was not a sufficient allegation of bad faith in an administrative setting.

In the context of exclusive dealing arrangements the concept of good faith has been extended to imply the exercise of reasonable efforts in performance, *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 224 (1917), but

8. Contrast with this holding the District Court's implications, which appear to have stopped short of a formal finding (Petition, 87a), that the "embarrassment" of one of Respondent's executives accounts for the level of promotion given the book. The District Court found such embarrassment understandable (Petition, 89a), but did not see the need to invoke it as the reason for Respondent's actions.

reasonable performance has long been distinguished from the standard of best efforts performance, as will be shown below.

The Court of Appeals did no more than to apply the essence of these longstanding New York rules to the contract between Petitioner and Respondent.

The District Court had clouded these rather simple legal propositions by its insistent references to an implied duty of "best efforts," a concept alien to New York law. The basic differences between "best efforts" and good faith performance are two: *first*, the perception of contracting laymen that "best efforts" means something more in the way of performance than would ordinarily be forthcoming, which explains why the term had been, until the District Court decision, a bargained-for promise, cf. *Robbins* v. *Ogden, Inc.*, 490 F.Supp. 801 (S.D.N.Y. 1980); *Dynamics Corp.* v. *International Harvester Co.*, 429 F.Supp. 341, 354 (S.D.N.Y. 1977); *In re Heard*, 6 Bankr. at 884; and *second*, the case law doctrine that one who promises "best efforts" promotion necessarily assumes risks of losses (short of "substantial" or "financially disastrous" losses) to maximize the benefit to the promisee, *Bloor* v. *Falstaff Brewing Co.*, 601 F.2d 609, 614-615 (2d Cir. 1979), which are risks the promisor under the lesser, implied duty of good faith doesn't assume. *Guardino Tank Processing Corp.* v. *Olsson*, 89 N.Y.S.2d at 698; *Dynamics Corp.* v. *International Harvester Co.*, 429 F.Supp. at 354. Cf. Frost, "Implied Covenants and the Duty to Develop in Underground Coal Gasification", 59 Texas L. Rev. 1175, 1305-8.

The District Court read "best efforts" into the contract functionally as well as literally, by imposing upon Respond-

ent a duty to perform to the extent of the maximum effort so much as contemplated in Respondent's internal communications, despite the fact that those contemplations were at no time communicated to Petitioner or made a part of the written contract. Internal documents drawn even before the book was in final form spoke of a 15,000 copy print run and a $15,000 budget. To the District Court, anything short of these figures had to be justified, regardless of the reasonability of what was actually done, just as if 15,000 copies and $15,000 had been written into the contract. In effect, under the District Court view discretion over the risks of expenditures was ended with those internal communications.

This transubstantiation of planning decisions into binding covenants flew in the face of relevant case authority, *see*, e.g., *Frankel* v. *Stein and Day, Inc.*, 470 F.Supp. 209, 214 (S.D.N.Y. 1979), *aff'd* 646 F.2d 540 (2d Cir. 1980); *West, Weir & Bartel, Inc.* v. *Mary Carter Paint Co.*, 25 A.D.2d 81, 85-86 (1st Dept. 1966), *app. dismissed* 19 N.Y.2d 812 (1967). It put Respondent under an obligation to perform beyond what even Petitioner's own expert characterized as Respondent's "perfectly adequate" performance in marketing Petitioner's work. (Petition, 19a). The Court of Appeals quite properly reversed such an unwarranted recasting of New York common law.

III.

The District Court's Shift of the Burden of Proof of Good Faith to Respondent Was Not a Finding of Fact Subject to Rule 52.

It is fundamental that the burden of proof is governed by state law in diversity actions involving a state-created right. *Bank of America* v. *Parnell*, 352 U.S. 29 (1956); *Palmer* v. *Hoffman*, 318 U.S. 109 (1943); *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208 (1939); *In re Air Crash Disaster*, 635 F.2d 67, 71 (2d Cir. 1980); *H.M.L. Corp.* v. *General Foods Corp.*, 365 F.2d 77 (3d Cir. 1966) (applying New York law).

The law of New York and the preliminary decision in this case hold that the party alleging a bad faith breach of contract has the substantial burden of proving it by a preponderance of the credible evidence. *Zilg* v. *Prentice-Hall, Inc.*, 515 F.Supp. 716, 719 (S.D.N.Y. 1981); *Gelder Medical Group* v. *Webber*, 41 N.Y.2d at 684, 394 N.Y.S.2d at 870-71, 363 N.E.2d at 577; *Gordon* v. *Nationwide Insurance Co.*, 30 N.Y.2d 427, 334 N.Y.S.2d 601; *New York Central Ironworks Co.* v. *United States Radiator Co.*, 174 N.Y. 331, 335-36, 66 N.E. 967, 968 (1903); *Random House, Inc.* v. *Gold*, 464 F.Supp. 1306; *Contemporary Mission, Inc.* v. *Famous Music Corp.*, 557 F.2d 918, 922 (2d Cir. 1977); *Dynamics Corp.* v. *International Harvester Co.*, 429 F.Supp. at 348-354; *Arnold Productions, Inc.* v. *Favorite Films Corp.*, 176 F.Supp. 862, 864-66 (S.D.N.Y. 1959), *aff'd*, 298 F.2d 540 (2d Cir. 1962); *H.M.L. Corp.* v. *General Foods Corp.*, 365 F.2d at 83. This rationale is buttressed by the decision in

Brown v. *McGraw-Hill Book Company, Inc.*, 25 A.D.2d 317, 320, 269 N.Y.S.2d 35, 38 (1st Dept. 1966), where the court, in considering the scope and performance of contractual obligations, reconfirmed the old rule that "[i]n the transactions of business life, sanity of end and aim is at least a presumption, albeit subject to be rebutted."

As the Court of Appeals properly noted (Petition, 19a), the District Court nowhere found that the efforts Respondent expended on behalf of Petitioner's book failed to give the book a reasonable chance to sell. Moreover, the Court of Appeals held that Petitioner had not produced evidence either of the inadequacy of Respondent's efforts or of any bad faith purpose for Respondent's failure to do more than these "perfectly adequate" efforts. (Petition, 19a-20a).

The District Court had rejected Petitioner's theory of bad faith—that Respondent was reacting to alleged du Pont "pressure"—and even hinted that such a reaction would not be actionable. (Petition, 80a n.30). Yet the District Court expressly absolved itself of any duty to find a motive for Respondent's action[9] (Petition, 87a, 88a), and one

9. In its Memorandum and Order denying Respondent's pre-trial Motion for Summary Judgment, the District Court correctly stated that under New York law "Prentice-Hall would not breach the contract if the relevant decisions it made were guided by any legitimate business purpose." (Petition, 117a). It also there stated that Respondent "would violate its contractual duty if it provided less than reasonable efforts to promote the Book *and* did so in order to deprive the plaintiff of the benefits he would otherwise have received under the Contract." [emphasis added] The District Court went on to make it absolutely clear that Respondent's intent was at the heart of the issue of whether it acted in good faith. However, in its Findings and Conclusions, the District Court erroneously held that as between Respondent and Petitioner, "the motives of [Respondent] are probably not especially significant" (Petition, 79a-80a), and "disclaim[ed] any necessity to attribute a motive to" Respondent's actions. (Petition, 88a).

reads the District Court opinion in vain for a finding of fact on this point.[10] Instead, the District Court's unwarranted rejection of Respondent's explanation for its actions left the record barren of any evidence of bad faith.[11] However, despite its earlier opinion that proof of bad faith was a "substantial burden" for Petitioner to bear, the District Court reversed field after trial and held that the burden had been on Respondent to prove its good faith.

In doing so, the District Court defeated the rationale underlying Respondent's discretionary right under its contract. New York law has recognized that contracting parties include such provisions to avoid "bitter and protracted litigation" over such details and to free the party exercising discretion from a cascade of commercially unreasonable demands. Cf. *Gelder Medical Group* v. *Webber*, 41 N.Y.2d at 684, 394 N.Y.S.2d at 871, 363 N.E.2d at 577; *Mandel* v.

10. As noted above, the District Court stopped short of a finding that Respondent's conduct was a result of "embarrassment" over the book (Petition, 87a), and New York law is to the effect that the avoidance of embarrassment is a valid purpose which does not transgress the implied duty of good faith in commercial agreements. *Gelder Medical Group* v. *Webber*, 41 N.Y.2d 680.

11. The Petition makes much of a finding that the explanation given by one of Respondent's witnesses for the print-run reduction was a "fabrication." But precedent from this and other courts holds that disbelief of a witness is not evidence to the contrary of that witness' story. *United States* v. *Marchand*, 564 F.2d 983, 984 (2d Cir. 1977), *cert. den.* 434 U.S. 1015 (1978); *Janigan* v. *Taylor*, 344 F.2d 781, 784 (1st Cir. 1965), *cert. den.* 382 U.S. 879 (1966); *Dickinson* v. *United States*, 346 U.S. 389, 396-7 (1953); *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576-7 (1951). Furthermore, neither the District Court nor the Petition refers to the fact that a witness for Petitioner confirmed the major premise of the explanation: that Respondent believed that the Fortune Book Club was going to buy 5000 copies of the book when the first print order was placed. Should this Court grant the Petition, Respondent will most certainly argue that the finding of fabrication was "clearly erroneous," but also ultimately irrelevant.

Liebman, 303 N.Y. 88, 100 N.E.2d 149 (1951). *See also* Burton, *supra*, 94 Harv. L. Rev. at 392-394 (1980). Recently, in *Murphy* v. *American Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983), the Court of Appeals held:

> "New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be enforced . . . In such instances the implied obligation is in aid and furtherance of the other terms of the agreement of the parties. *No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship.*" [emphasis added] 58 N.Y.2d at 304-305, 461 N.Y.S.2d at 237, 448 N.E.2d at 91.

So the nub of where the courts below differed was in a determination of whether Petitioner or Respondent had to fill in what the District Court apparently saw as an explanatory gap as to the "why" of Respondent's actions. The District Court held that Respondent had to explain itself even in the absence of credible evidence of bad faith. The Court of Appeals held that for Petitioner to prevail on a claim of breach, Petitioner had to come forward with evidence of breach, i.e., evidence of bad faith, and that Petitioner could not merely rely upon the absence of an explanation credible to the District Court to make its case.

Even had the burden been properly shifted to Respondent, the Court of Appeals found in the Record proof of what constitutes a legitimate business reason under New York law which the District Court failed to recognize. As Petitioner's Brief to the Court of Appeals stated (at 47), the "cut [in the first printing] was ordered by Grenquist of

[Prentice-Hall] after he learned of the failure of [Prentice-Hall's] efforts to persuade [Book of the Month Club, Inc.] to reconsider its decision not to use the work." The Court of Appeals held that a cut in printing and promotion based upon BOMI's retreat would be a "rational reaction" to the diminuation of the book's commercial prospects. (Petition, 21a). In so holding, the Court of Appeals did not overrule the District Court's finding that none of the original 15,000-book print order had been earmarked for Fortune Book Club use. It simply held that such reactive measures taken in response to significant market changes were legitimate under New York law.

This Court's classic formulation of the "clearly erroneous" rule presupposes appellate testing of whether burden of proof has been met:

> "A finding is 'clearly erroneous' when *although there is evidence to support it,* the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." [emphasis added] *United States* v. *United States Gypsum Co.*, 333 U.S. at 395.

More recently, in *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979), this Court approved a Court of Appeals' review of burden of proof as follows:

> "Based on its review of the entire record, the Court of Appeals concluded that the Board had not responded with sufficient evidence to counter the inference that a dual system was in existence in Dayton in 1954." 443 U.S. at 536.

So examination of whether a burden of proof has been met is entirely proper for a Court of Appeals. That in-

quiry was a brief one here: the Court of Appeals said there was *no* evidence to support the charge of bad faith. It is difficult to imagine that a proper issue for this Court's scrutiny is presented by a Court of Appeals' omission of the shibboleth "clearly erroneous" once it has already called a record barren of evidence to support a judgment.

Conclusion

For the reasons stated above, the Petition should be denied.

Dated: March 15, 1984

Respectfully submitted,

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List of Parent Companies, Etc. Pursuant to Rule 28, Supreme Court of the United States Revised Rules

1. Name of corporation on whose behalf this Brief is filed:

   Prentice-Hall, Inc.

2. Parent companies of Prentice-Hall, Inc.:

   None.

3. Subsidiaries (other than wholly-owned subsidiaries) of Prentice-Hall, Inc.:

   Editora Prentice-Hall do Brasil Limitada
   Brookvale Developments No. 1 Pty. Limited
   Brookvale Developments No. 2 Pty. Limited
   International Book Distributors Ltd.
   International Depository of Australia Pty. Limited
   Prentice-Hall Canada Inc.
   Prentice-Hall of Australia Pty. Limited
   Prentice-Hall of India Private Limited
   Prentice-Hall Japan, Inc.

4. Affiliates of Prentice-Hall, Inc:

   Know How, Inc.

No. 83-1364.

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

GERARD COLBY ZILG,
PETITIONER,

v.

PRENTICE-HALL, INC.,
RESPONDENT.

Petitioner's Reply Brief.

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In the
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No. 83-1364

GERARD COLBY ZILG,
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Respondent

Petitioner's Reply Brief

Prentice-Hall attempts to banish the constitutional issue from this case by arguing that all the Court of Appeals was really doing was reversing errors of state law. The Appeals Court's decision, however, cannot be explained away so easily.

First, despite references to best efforts, the district court's decision and its memorandum denying summary judgment applied the good faith standard. Second,

the Appeals Court did not say it was reversing on a burden of proof issue. It simply made an independent finding--contrary to the trial court's--that Zilg had not produced evidence that the publisher was motivated by other than good faith business judgment.

Prentice-Hall's failure to address the First Amendment issue does not make the issue disappear. The essential fact remains that the Appeals Court's reversal was based on its independent judgment about marketability--a judgment explicitly based on the book's viewpoint and content, and flatly at odds with the district court's determination that the book would have sold 25,000 copies had Prentice-Hall not intentionally withheld sales efforts.

Finally, Prentice-Hall appears to concede that Rule 52(a) was violated, but urges that the Rule is only a

"shibboleth." Brief in Opposition at 17. This is not a proper construction of the rule. Prentice-Hall's concession requires at least a summary reversal in the event that the Court does not think full briefing and argument necessary.

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March 26, 1984